ELLEN F. ROSENBLUM
Attorney General

FREDERICK M. BOSS
Deputy Attorney General

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

January 5, 2016

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

Re: *Heather Conroy v. Ellen Rosenblum*
SC S063735

Dear Chief Justice Balmer:

Petitioners Heather Conroy, Mike Forest, Maggie Neel, Trent Lutz, Richard Schwarz, and Hanna Vaandering have filed ballot title challenges 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 Compliance Specialist 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.

Sincerely,

/s/ Shannon T. Reel

Shannon T. Reel
Assistant Attorney General
shannon.t.reel@doj.state.or.us

ST2:aft/7066866

cc: Steven C. Berman
Nathan R. Rietmann
Aruna A. Masih

IN THE SUPREME COURT OF THE STATE OF OREGON

HEATHER CONROY, MARGARET ("MAGGIE") NEEL, an individual elector, MIKE FOREST, an individual elector, HANNA VAANDERING, TRENT LUTZ, and RICHARD SCHWARZ, Petitioners, v. ELLEN ROSENBLUM, Attorney General, State of Oregon, Respondent.	Supreme Court No. S063735 RESPONDENT'S ANSWERING MEMORANDUM TO PETITIONS TO REVIEW BALLOT TITLE RE: INITIATIVE PETITION NO. 62

Petitioners seek review of the Attorney General's ballot title for Initiative Petition 62 (2016) (IP 62), arguing that it does not satisfy the requirements of ORS 250.035(2). Petitioners Neel and Forest challenge all parts of the ballot title. Petitioners Vaandering, Lutz, and Schwarz challenge all parts of the ballot title. Finally, petitioner Conroy challenges the caption, "Yes" result statement, and summary portions of the Attorney General's ballot title. This court reviews ballot titles for "substantial compliance with the requirements of ORS 250.035." ORS 250.085(5). The Attorney General submits this answering memorandum as authorized pursuant to ORAP 11.30(6). As explained below, the Attorney General's ballot title substantially complies with ORS 250.035.

A. The Attorney General's caption substantially complies with ORS 250.035(2)(a).

Petitioners challenge the caption for IP 58, which reads:

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Public employee union may require dues/fees only for limited representation/bargaining activities; authorizes lawsuits

The caption for the ballot title of a state measure must contain no more than 15 words and reasonably identify the "subject matter" of the measure, which is "the 'actual major effect' of a measure or, if the measure has more than one major effect, all such effects (to the limit of the available words).'" *McCann v. Rosenblum*, 354 Or 701, 706, 320 P3d 548 (2014) (quoting *Lavey v. Kroger*, 350 Or 559, 563, 258 P3d 1194 (2011)); ORS 250.035(2)(a). To identify the "actual major effect" of a measure, the Attorney General must consider the "changes that the proposed measure would enact in the context of existing law." *Rasmussen v. Kroger*, 350 Or 281, 285, 253 P3d 1031 (2011).

1. The caption reasonably identifies the actual major effects of IP 62.

The Attorney General correctly and reasonably identified the "actual major effects" of IP 62. First, the measure's text provides that a public employee union may charge dues or fees only for limited representation and bargaining activities. IP 62 prevents the collection of dues "if any portion of those dues may be used by the labor organization to pay for, or subsidize, political or ideological activities or expenditures that are not necessarily or reasonably incurred for the purpose of representation and collective bargaining

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with the employee's public employer on matters concerning employment relations." Second, IP 62 authorizes any bargaining unit member to sue the union to enforce the provisions of the measure. Currently, under ORS 243.676, the Employment Relations Board (ERB) has exclusive jurisdiction to review complaints "alleging that any person has engaged in or is engaging in any unfair labor practice listed in ORS 243.672 (1) and (2) and 243.752." Thus, IP 62 divests the Employment Relations Board of its exclusive jurisdiction, and that effect must be included in the caption. *Sizemore/Terhune v. Myers*, 342 Or 578, 587-88, 157 P3d 188 (2007).

In sum, the caption, which reasonably identifies the "actual major effects" of IP 62, substantially complies with ORS 250.035(2)(a).

2. Petitioners' contrary arguments lack merit.

Chief petitioners Neel and Forest contend that the caption is deficient because it fails to inform voters of what they contend are the actual major effects of IP 62: (1) it "prohibit[s] public employee unions from requiring employees to pay dues *as a condition of membership* that are used for political, ideological, and other non-collective bargaining purposes, and (2) it allows "public employee unions to collect money for political, ideological, and other purposes unrelated to representation and collective bargaining with the

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voluntary written consent of members." (Neel/Forest Petition, 3). They contend that the phrase "limited representation/bargaining activities" is "not legally defined and it is not terminology used in general parlance," will confuse voters, and is "highly speculative and inconsistent" with current law. (*Id*. at 3-4). They also argue that the caption overstates the scope of IP 62 by providing that a public employee union "may require dues/fees only for limited representation/bargaining activities" because IP 62 permits members to voluntarily enter into agreements with their union to provide funds for non-collective bargaining activities. (*Id*. at 4). They also object that the word "fees" is inaccurate and unnecessary, and could be replaced with the word "money." (*Id*.). Further, they argue that "authorizes lawsuits" is underinclusive because there are other enforcement mechanisms in the measure. (*Id*.). Finally, they argue that the word "member" should be used in the caption. (*Id*. at 6).

Petitioners Vaandering, Lutz, and Schwarz argue that IP 62 amends Oregon's Public Employee Collective Bargaining Act, ORS 243.650 *et seq*. (the "PECBA") to create a "free rider" effect, that is, that it will allow public employees to receive the benefit of union representation without paying all of the costs of that representation. (Vaandering/Lutz/Schwarz Petition at 1-2). Petitioners also argue that IP 62 changes membership conditions. (*Id*. at 2,

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4-7). They therefore contend that the caption is underinclusive and non-compliant because it fails to address those effects. (*Id*. at 4-7).

Petitioner Conroy also argues that the caption is deficient because it fails to inform voters of a "free rider" effect. (Conroy Petition, 2-6). She argues

> When section 3(2)(c) is read in conjunction with section 3(2)(b) and section 5, the free-rider effect the Initiative creates is readily apparent. Under the Initiative, to become a union member, all an employee must do is pay for representation and collective bargaining services concerning employment relations. An employee can stop being a union member at any time. When an employee stops being a member, the employee may discontinue making any payments to a union whatsoever, including "money required as a condition of membership." Initiative, § 3(2)(c). Simply put, the Initiative allows a public employee in a represented bargaining unit to stop making fair-share payments for representation and collective bargaining services concerning employment relations at any time.

(*Id*. at 4).

However, petitioners' arguments fail to demonstrate that the prepared caption fails to satisfy the requirements of ORS 250.035(2)(a).

a. The caption is not misleading.

As noted above, the caption reasonably identifies the "actual major effects" of IP 62. Pursuant to the measure, a public employee union may require dues or fees only for limited representation and bargaining activities, and any bargaining unit member may sue to enforce the provisions of the measure. Petitioners' arguments to the contrary are incorrect.

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First, the related facts that (1) the measure prohibits requiring such dues or fees *as a condition of membership* and (2) the prohibition may be waived by written consent, are adequately captured by the caption's use of the word "require" in the phrase "may *require* dues/fees only for limited representation/bargaining activities." (emphasis added).

Second, the phrase "limited representation/bargaining activities" reasonably explains that, if IP 62 were to pass, a public employee union could only charge mandatory dues and fees for limited reasons. In the context of a measure pertaining to unions, the Attorney General respectfully submits that concepts of representation and bargaining are unlikely to be confusing to voters.

Third, the use of the word "fees" is a reasonable way of addressing the language in IP 62 relating to "member dues, or other money[.]" *See, e.g.*, Section 2(b).

Fourth, the phrase "authorizes lawsuits" is not underinclusive so as to make the ballot title non-compliant. Of course, it cannot be exhaustive, particularly in the caption. Petitioner Conroy is correct that IP 62 changes current law by providing that a labor organization may not be certified as an exclusive representative if it fails to comply with the measure. But the significance of that provision is minor in comparison to the other effects

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described throughout the title. At most, it ties violations of the proposed measure to existing certification (and possibly decertification) proceedings. The fact that new requirements would be enforceable using related procedures that already exist is unsurprising and does not work a change akin to the provisions authorizing lawsuits. In contrast, it has been established that provisions authorizing lawsuits and divesting the ERB of its exclusive jurisdiction are a "major effect" that must be included in the caption. *Sizemore/Terhune v. Myers*, 342 Or at 587-88.

Finally, the proposed replacement of the word "employee" with the word "member" would be inaccurate, because any individual public employee may give the union consent to collect money for expenditures that are unrelated to representation.

b. IP 62 does not create a "free rider" effect.

Section 3(2)(c) of IP 62 provides that each individual public employee within an appropriate bargaining unit has "[t]he right to cancel membership in a labor organization recognized as an exclusive representative, and discontinue paying all member dues or other money required as a condition of membership, at any time." By its terms, this provision does not modify existing law under which nonmembers can be required to make payments in lieu of dues. That is

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because such "fair share" payments are neither (a) "member dues" nor (b) "money required as a condition of membership." To the contrary, those payments are only required of employees who are *not* members of the union. Payments required only of nonmembers cannot constitute "money required as a condition of membership."

Thus, though Petitioner Conroy is correct that an employee "can stop being a union member at any time," IP 62 would not excuse that employee from making any payments in lieu of dues required by the applicable collective bargaining agreement. IP 62 would limit those payments to amounts necessary to fund expenditures "necessarily or reasonably incurred for the purpose of representation and collective bargaining with their employer on matters concerning employment relations." That limitation corresponds precisely to the extent of a union's representation obligations under ORS 243.666(1):

> A labor organization certified by the Employment Relations Board or recognized by the public employer is the exclusive representative of the employees of a public employer for the purposes of collective bargaining *with respect to employment relations*.

(Emphasis added.) Consequently, under the measure, it appears that collective bargaining agreements could still require non-member employees to make

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payments reflecting all of the work that unions are legally required to perform for them. Thus, the proposed law does not create a "free rider" effect.

The prepared caption reasonably identifies the major effects of IP 62. Therefore, this court should approve the caption for IP 62 without modification.

B. The "yes" and "no" vote result statements substantially comply with ORS 250.035(2)(b) and (2)(c).

Petitioners also challenge the "yes" and "no" vote result statements of the ballot title for IP 62. Those statements read:

> **Result of "Yes" Vote:** "Yes" vote prohibits public employee union from requiring dues/fees for union activities unrelated to limited representation/bargaining; employee may authorize additional payments. Authorizes lawsuits.
>
> **Result of "No" Vote:** "No" vote retains ability of public employee unions to require dues/fees for all union representation/bargaining activities, require member dues for other union activities.

The "yes" and "no" vote result statements "must include simple and understandable statements, of no more than 25 words each, that describe the result if the measure is approved and the result if the measure is rejected." *Milne v. Rosenblum*, 354 Or 808, 813, 323 P3d 260 (2014) (citing ORS 250.035(2)(b) and (2)(c)). With respect to the vote result statements, petitioners raise the same arguments and objections raised with respect to the

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caption. For the same reasons discussed above with respect to the caption, both vote result statements sufficiently include simple and understandable statements describing the result of the measure if it is approved or rejected. Accordingly, this court should conclude that the "yes" and "no" vote result statements satisfy ORS 250.035(2)(b) and (2)(c).

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

Petitioners also challenge the summary of the ballot title for IP 62, which reads:

> Currently, public employees in a bargaining unit may be represented by a union. Union may require dues from its members to fund expenditures related to all bargaining/representation and other union activities. Collective bargaining agreements can require represented nonmembers to pay fees, but nonmembers cannot be required to pay fees for union activities unrelated to bargaining/representation. Measure prohibits requiring any dues/fees that fund activities other than union bargaining/representation concerning "employment relations" (defined). "Employment relations" includes all subjects on which unions, employers must bargain, but not all subjects on which they are allowed to bargain. Measure permits union to separately collect itemized payments for other representation/bargaining activities, and other union activities from employee who authorizes additional amounts. Authorizes enforcement lawsuits. Other provisions.

ORS 250.035(2)(d) provides that a ballot title summary be "[a] concise and impartial statement of not more than 125 words summarizing the state measure and its major effect." The function of the summary is "to provide

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voters with enough information to understand what will happen if the measure is approved." *Caruthers*, 347 Or at 670. That information may include a description of the effect of the measure at issue on other laws, so long as the description is accurate. *Berman v. Kroger*, 347 Or 509, 514, 225 P3d 32 (2009). In all events, the information must pertain to an identified, actual "effect" of enacting the measure; it is not permissible to "speculate about the possible effects of a proposed measure." *Pelikan/Tauman*, 342 Or at 389.

With respect to the summary, petitioners largely raise the same arguments and objections raised with respect to the caption and result statements. For the same reasons discussed above with respect to the caption, this court should reject those arguments.

Chief petitioners Neel and Forest also argue that the word "may" in the first sentence of the summary "misleadingly implies that individual public employees within a bargaining unit can may [*sic*] decide whether they are represented by a union." (Neel/Forest Petition, 9). But public employees in a bargaining unit are not required to be represented by a union, but may choose to do so. ORS 243.662; ORS 243.682. Petitioners next argue that the summary should describe existing law regarding "collective bargaining" and the phrase "necessarily or reasonably." (Neel/Forest Petition, 10). But such an

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explanation is unnecessary to provide voters with enough information to understand what will happen if the measure is approved, because the summary appropriately explains that public employee unions will be prohibited from charging dues or fees funding activities other than union bargaining and representation concerning "employment relations," and provides an explanation concerning that term. Moreover, given the 125 word limit, such further explanation would require the removal of other language explaining the effects of the measure. Petitioners also object to the phrase "permits union to separately collect itemized payments for other representation/bargaining activities, and other union activities from employee who authorizes additional amounts," because, they argue, the measure permits a union to separately collect itemized payments "*that are additional to member dues* for the purpose of '*engaging in otherwise lawful political or ideological activities or expenditures that are not necessarily incurred for the purpose of collective bargaining…*'". (*Id*., emphasis added by Neel/Forest). But petitioners do not explain why they object to the phrasing in the summary or why it is incorrect. In any event, the measure correctly states the impact of section 6 of the measure, which allows an exclusive representative to engage in "otherwise lawful political or ideological activities or expenditures that are not necessarily

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(503) 378-4402

or reasonably incurred for the purpose of collective bargaining * * * on matters concerning employment relations" with the authorization of an employee.

Petitioner Conroy also argues that the summary is deficient because it fails to adequately alert voters to the "unique remedy provision and cause of action" created by the measure. (Conroy Petition, 7-8). But the phrase "authorizes lawsuits" adequately informs voters that the measure creates a cause of action. *Mabon v. Kulongoski*, 324 Or 315, 319-20, 925 P2d 1234 (1996) (where subject matter of measure includes right to bring legal action, use of "permits lawsuits" in caption permissible). Finally, she argues that the summary is deficient because it fails to mention IP 62's "curious—and unenforceable—provision that seeks to limit the authority of the legislature to amend certain provisions of the initiative." (Conroy Petition, 9-10). However, it is generally inappropriate for the Attorney General to opine in a ballot title regarding whether a provision is constitutional. *McCann v. Rosenblum*, 355 Or. 256, 264, 323 P.3d 955, 960 (2014) (where unclear whether provisions in a ballot measure would be held unconstitutional or severable, "we cannot fault the Attorney General for declining to factor those complex legal determinations into her description of the measure's effects"). Compare *Caruthers*, 344 Or at 601 (referring the ballot title for modification when the legal effect of the

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measure was undisputed). Furthermore, that provision, valid or not, is not a major effect of the measure and, given the 125 word limit, the actual major effects of the measure take precedence over an explanation of that provision and its potential effect.

The summary sufficiently explains the measure and its major effects, and enables voters to understand what will happen if the measure is approved. Accordingly, this court should conclude that the summary satisfies ORS 250.035(2)(d).

D. Conclusion

For the reasons discussed above, the Attorney General's ballot title should be certified without modification.

Respectfully submitted,

ELLEN F. ROSENBLUM #753239
Attorney General
PAUL L. SMITH #001870
Deputy Solicitor General

/s/ Shannon T. Reel
SHANNON T. REEL #053948
Assistant Attorney General
shannon.t.reel@doj.state.or.us

Attorneys for Respondent
Ellen Rosenblum, Attorney General,
State of Oregon

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 378-4402

Axell Katherine

From: PLUKCHI Lydia <lydia.plukchi@state.or.us>
Sent: Wednesday, December 16, 2015 9:27 AM
To: THOMAS Alicia F; AXELL Katherine
Subject: Initiative Petition #62 Appealed
Attachments: 062cbt.pdf; 062cmts.pdf; 062dbt.pdf

OFFICE OF THE SECRETARY OF STATE

JEANNE P. ATKINS
SECRETARY OF STATE

ROBERT TAYLOR
DEPUTY SECRETARY OF STATE

ELECTIONS DIVISION

JIM WILLIAMS
DIRECTOR

255 CAPITOL STREET NE, SUITE 501
SALEM, OREGON 97310-0722

(503) 986-1518

December 16, 2015

The Hon. Ellen Rosenblum, Attorney General
Paul Smith, Deputy Solicitor General
Dept. of Justice, Appellate Division
400 Justice Building
Salem, OR 97310

Via Email

Dear Mr. Smith:

In accordance with ORS 250.067(4) please file the attached comments with the court as part of the record in the ballot title challenge filed by Steven Berman, Nathan Rietmann and Aruna Masih on Initiative Petition **2016-062**. Also attached are the draft and certified ballot titles with their respective transmittal letters.

Sincerely,

Lydia Plukchi
Compliance Specialist

ELLEN F. ROSENBLUM
Attorney General

FREDERICK M. BOSS
Deputy Attorney General

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

December 1, 2015

Jim Williams
Director, Elections Division
Office of the Secretary of State
255 Capitol Street NE, Ste. 501
Salem, OR 97310

Re: Proposed Initiative Petition — Public Employee Union May Require Dues/Fees Only for Limited Representation/Bargaining Activities; Authorizes Lawsuits
DOJ File #BT-62-15; Elections Division #2016-062

Dear Mr. Williams:

We received comments on the Attorney General's draft ballot title for Initiative Petition 62 (2016) (BT-62-15) from chief petitioners Maggie Neel and Mike Forest (through counsel, Nathan Rietmann), Hanna Vaandering and Trent Lutz (through counsel, Margaret Olney), Ben Unger and Heather Conroy (through counsel, Steven Berman), and Richard Schwarz. The commenters object to the parts of the draft ballot title as follows:

Ms. Neel and Mr. Forest object to all parts the draft ballot title;
Ms. Vaandering and Mr. Lutz object to all parts of the ballot title;
Ms. Conroy objects to all parts of the ballot title; and
Mr. Schwarz objects to all parts of the ballot title.

In this letter, we discuss why we made or did not make changes to each part of the ballot title in light of the submitted comments.

Procedural constitutional requirements

Commenters Hanna Vaandering and Trent Lutz (through counsel, Margaret Olney), Ben Unger and Heather Conroy (through counsel, Steven Berman), and Richard Schwarz raise the issue of whether the proposed measure unconstitutionally restricts the powers of the legislature, and therefore must be submitted as a constitutional amendment. Commenter Richard Schwarz also contends that the measure is unconstitutional because it impairs contracts. Those issues are beyond the scope of the ballot title drafting process. *See* OAR 1650-14-0028 (providing for separate review process by Secretary of State to determine whether measure complies with constitutional procedural requirements for proposed initiative measures). Accordingly, we do not address them here.

A. The caption

The ballot title must include "[a] caption of not more than 15 words that reasonably identifies the subject matter of the state measure." ORS 250.035(2)(a). The "subject matter" is "the 'actual major effect' of a measure or, if the measure has more than one major effect, all such effects (to the limit of the available words)." *Lavey v. Kroger*, 350 Or 559, 563, 258 P3d 1194 (2011). To identify the "actual major effect" of a measure, the Attorney General must consider the "changes that the proposed measure would enact in the context of existing law." *Rasmussen v. Kroger*, 350 Or 281, 285, 253 P3d 1031 (2011). The draft caption provides:

Public employee union cannot collect dues for uses other than representation, bargaining without member authorization

We address the comments and objections below.

1. Comments from Ms. Neel and Mr. Forest

Ms. Neel and Mr. Forest object that the caption is deficient in one respect. They argue that the "actual major effect" of IP 62 is "on the collection of dues that are for *political* and *ideological* activities unrelated to collective bargaining," and that the caption should identify that effect. (Rietmann Letter, 4 (emphasis in original)).

2. Comments from Ms. Vaandering and Mr. Lutz

Ms. Vaandering and Mr. Lutz contend that the draft caption is deficient in four material respects. First, Ms. Vaandering and Mr. Lutz contend that the draft caption fails to identify a "free-rider" effect of IP 62. (Olney Letter, 9-10). They argue that IP 62 gives all covered employees the right to not be a member or pay any money required to be a member at any time, but does not otherwise change current law requiring unions to represent all bargaining unit members. (Olney Letter, 10). Therefore, they argue, an actual major effect is that "employees can, at any time, 'receive services from a labor organization without having to pay for them.'" (Id.). They argue that the caption must identify the free-rider effect like other similar initiative measures. (*Id.*). They propose that the caption should read: "Allows public employees to receive union representation without paying costs; authorizes lawsuits, attorney fees." (Olney Letter, 11); *see Novick/Bosak v. Myers*, 333 Or 18, 26, 36 P3d 464 (2001) (requiring ballot title for IP 39 (2002) to identify free-rider effect); *Sizemore/Terhune v. Myers*, 342 Or 578, 588-89, 157 P3d 188 (2007) (requiring ballot title for IP 48 (2008) to identify free-rider effect); *Towers v. Rosenblum*, 354 Or 125, 131, 310 P3d 136 (2013) (requiring caption for IP 9 (2014) to identify free-rider effect).

Second, relying on *Sizemore/Terhune v. Myers*, 342 Or at 587-88, Mr. Vaandering and Mr. Lutz contend that currently, the Employment Relations Board (ERB) has exclusive jurisdiction to interpret and enforce all disputes arising out of the Public Employee Collective Bargaining Act (the PECBA). (Olney Letter, 10). They argue that the measure authorizes any bargaining unit member to sue the union to enforce the provisions of the measure, thus divesting the ERB of its exclusive jurisdiction. (*Id.*). Therefore, they argue that the caption should inform

voters that the measure creates a new private right of action in circuit court to enforce the provisions of the proposal. (*Id.*).

Third, they argue that because the measure limits permissible expenditures to negotiations and collective bargaining "concerning employment relations," the measure appears to prohibit the collection of fees for historically "chargeable" for "permissive" expenditures related to negotiations and contract enforcement, and therefore the caption's reference to "representation" is misleading and overbroad. (Olney Letter, 11).

Finally, they contend that the reference to "member" in the second clause is inaccurate, because the measure provides that a union can collect money from any covered employee for expenditures that are unrelated to representation with authorization, and that union membership is irrelevant. (Olney Letter, 11).

3. Comments from Ms. Conroy

Ms. Conroy objects to the draft caption in several respects. First, like Commenters Vaandering and Lutz, she writes that the caption fails to alert voters to a "free-rider" effect caused by the measure. (Berman Letter, 5-7). Likewise, she objects that the caption fails to inform voters that the measure creates a new private right of action that alters the jurisdiction of the ERB. (Berman Letter, 7-8). Ms. Conroy also contends that the phrase "[p]ublic employee union cannot collect dues for uses other than representation, bargaining" is inaccurate because the effect of the measure is unclear as to the definition of dues "necessarily and reasonably incurred for the purpose of representation and collective bargaining." (Berman Letter, 7).

4. Comments from Mr. Schwarz

Mr. Schwarz also objects to the draft caption in multiple respects. He argues that the caption is "badly flawed" because it does not accurately capture "any of the effects of IP 62, and mischaracterizes the plain text." (Schwarz Letter, 9). Like Commenters Vaandering, Lutz, and Conroy, he argues that the caption fails to describe a free-rider effect of IP 62. (Schwarz Letter, 9-10).

5. Our response to the comments

After consideration of the comments concerning the draft caption, we agree that the caption should be revised.

With respect to Ms. Neel's and Mr. Forest's argument that the caption should identify that IP 62 changes law by preventing the collection of dues "that are for *political* and *ideological* activities unrelated to collective bargaining," we disagree that that is the "actual major effect" of the measure that should be included in the caption. IP 62 prevents the collection of dues for "political or ideological activity *or expenditure that is not necessarily or reasonably incurred for the purpose of representation and collective bargaining with their employer on matters concerning employment relations*." Thus, by its terms, the measure extends to bargaining or activities beyond political and ideological activities. Although political and ideological expenditures may be the ones that petitioners are motivated to address, we do not think it is

appropriate for the ballot title to focus on those narrow aspects of the broader proposed change simply because doing so would be consistent with petitioners' motives.

With respect to Ms. Vaandering's, Mr. Lutz's, Ms. Conroy's, and Mr. Schwarz's objections about the purported free-rider effect of IP 62, after consideration of relevant statutes and decisions concerning PECBA, we agree with some of their points, but ultimately conclude that, under IP 62, unions would not be legally required to do any activity that they cannot charge to all employees who benefit.

The four commenters first argue that Section 3(2)(c) creates a free-rider effect. That paragraph provides that each individual public employee within an appropriate bargaining unit has "[t]he right to cancel membership in a labor organization recognized as an exclusive representative, and discontinue paying all member dues or other money required as a condition of membership, at any time." By its terms, this provision does not modify existing law under which nonmembers can be required to make payments in lieu of dues. That is because such "fair share" payments are neither (a) "member dues" nor (b) "money required as a condition of membership." On the contrary, those payments are only required of employees who are *not* members of the union. We cannot conclude that payments required only of nonmembers constitute "money required as a condition of membership." Consequently, by its plain terms, this paragraph would not create the free-rider effect suggested by the commenters.

Those commenters also point out that the right IP 62 would confer allows each individual public employee within an appropriate bargaining unit "to refrain from financially supporting or subsidizing * * * any expenditure that is not necessarily or reasonably incurred for the purpose of representation and collective bargaining with their employer *on matters concerning employment relations*." (Emphasis added.) Commenters point out that "employment relations" is defined by ORS 243.650 and "includes, but is not limited to, matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment." They note that there are multiple exclusions from that statutory definition, including "permissive, nonmandatory subjects of bargaining," and subjects "that have an insubstantial or de minimus effect on public employee wages, hours, and other terms and conditions of employment."

Arguably, expenses incurred in connection with representation on subjects that are excluded from the definition of "employment relations" would always be "necessarily or reasonably incurred" in connection with subjects that do constitute "employment relations." By way of example, all of those subjects would be negotiated together during collective bargaining and would be substantively interconnected. An employer might make a concession on a nonmandatory subject of bargaining in order to obtain a concession from a union on a mandatory bargaining subject. But this interpretation of IP 62 would effectively require us to read the term "employment relations" out of the measure. Principles of statutory interpretation require us to give effect to the words of a measure. Consequently, it appears that IP 62 would limit mandatory dues (and nonmember payments in lieu of dues) to amounts that are based on union expenditures "necessarily or reasonably incurred" in connection with only those activities that concern "employment relations."

We agree that this is a change that the ballot title must identify and explain. But to the extent that commenters argue that this legally requires unions to allow free-riders, we do not agree. That is because existing ORS 243.666(1) imposes an identical limitation on the extent to which unions are required to act as exclusive representatives:

> A labor organization certified by the Employment Relations Board or recognized by the public employer is the exclusive representative of the employees of a public employer for the purposes of collective bargaining *with respect to employment relations*.

(Emphasis added.) IP 62 does not propose to change this limitation. Consequently, it appears that unions retain the legal authority to require employees to make payments reflecting all of the work that unions are legally required to perform for them. It is possible that, were IP 62 to pass, unions would continue to negotiate and otherwise represent employees with respect to matters that are not "employment relations," as that term is defined by statute and interpreted by the Employment Relations Board. If that were to occur, unions could find themselves doing work for which they could not charge public employees who benefit – whether those employees are members of the union or not. On the other hand, it would be legally permissible for unions to simply refuse to bargain on matters that are not "employment relations." In that case, it does not appear that the unions would be undertaking any activities that would benefit a person not paying for the work. Consequently, it appears that any free-rider effect is both speculative and ultimately within the control of the union. As a result, we have modified the ballot title to explain that mandatory dues and fees would not be permitted to cover some representational activity that unions can – but are not required to – undertake. But we have not described this as creating a free-rider effect.

With respect to Ms. Vaandering, Mr. Lutz's, and Ms. Conroy's objection that the caption should inform voters that the measure authorizes any bargaining unit member to sue the union to enforce the provisions of the measure, thus divesting the ERB of its exclusive jurisdiction, we agree that the caption should inform voters that the measure authorizes lawsuits. *Sizemore/Terhune v. Myers*, 342 Or at 587-88.

Finally, we agree that the reference to "member" in the second clause is inaccurate, because any individual public employee may give the union consent to collect money for expenditures that are unrelated to representation.

In light of all of the comments concerning the draft caption, we modify the caption to read as follows:

Public employee union may require dues/fees only for limited representation/bargaining activities; authorizes lawsuits

B. The "yes" and "no" vote result statements

We next consider the draft "yes" and "no" vote result statements. A ballot title must include "[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is approved." ORS 250.035(2)(b). The "yes" vote result statement

should identify "the most significant and immediate" effects of the measure. *Novick/Crew v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). The draft "yes" vote result statement provides:

> **Result of "Yes" Vote:** "Yes" vote prohibits public employee union from collecting dues from any member to fund activities unrelated to representation or collective bargaining, unless authorized by member.

A ballot title must include "[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is rejected." ORS 250.035(2)(b). The "no" vote result statement "should 'address[] the substance of current law *on the subject matter of the proposed measure*' and 'summarize [ ] the current law accurately.'" *McCann v. Rosenblum*, 354 Or 701, 707, 320 P3d 548 (2014) (quoting *Novick/Crew*, 337 Or at 577) (emphasis added in *Novick/Crew*). The draft "no" vote result statement provides:

> **Result of "No" Vote:** "No" vote retains existing ability of public employee unions to collect dues from members for union purposes not directly related to representation or collective bargaining.

We address the comments and objections below.

1. Comments from Ms. Neel and Mr. Forest

Ms. Neel and Mr. Forest reiterate their objection to the caption, above, and argue that the draft "yes" vote result statement should be revised to notify voters that IP 62 will affect the collection of dues is that are for political and ideological activities, and that the draft "no" vote result statement should clarify that public unions are currently able to collect such dues as a condition of membership. (Rietmann Letter, 5).

2. Comments from Ms. Vaandering and Mr. Lutz

Ms. Vaandering and Mr. Lutz raise multiple objections to the draft "yes" vote result statement. First, they argue that the statement fails to identify the free-rider issue. (Olney Letter, 12). Second, they claim that the words "representation" and "collective bargaining" are misleading because the scope of those terms in IP 62 is narrower than is commonly understood. (*Id.*). Third, they reiterate their objection to the word "member." (*Id.*). Finally, they argue that the "yes" vote result statement should identify certain changes enacted by the measure, including the change in membership rules and the new enforcement scheme. (*Id.*).

Ms. Vaandering and Mr. Lutz also raise multiple objections to the draft "no" vote result statement. First, they argue that it is misleading because current law authorizes agreements between a public employer and public employee union to collect dues or "fair share" payments from all covered employees and, they contend, the draft "no" statement suggests that a union has the ability to collect dues unilaterally. (Olney Letter, 13) Second, they note that IP 62 allows employees to avoid paying even "fair share" payments, and that IP 62 requires consent from both members and nonmembers for dues payments. They argue that the "no" result statement should inform voters that public employers and unions may negotiate agreements to require all employees to share in the costs of legally required union representation. (Olney Letter, 13-14).

Finally, they contend that the draft "no" result statement should reference current law allowing a union to set membership terms. (Olney Letter, 14).

3. Comments from Ms. Conroy

Ms. Conroy reiterates her objections to the caption, above, and contends that they apply to the draft "yes" and "no" vote result statements. (Berman Letter, 8). She further contends that the draft "no" vote result statement misstates current law, which may require a non-member public employee to share in representation costs, and allows public employees to choose not to pay dues unrelated to representation or collective bargaining.

4. Comments from Mr. Schwarz

Mr. Schwarz argues that the draft "yes" vote result statement is deficient because it "ignores the full range of requirements IP 62 places on public employee unions," including requiring them to "redefine membership in their organization and reduce their dues rate to the same as would otherwise be the non-member fair share fee." (Schwarz Letter, 10-11). Schwarz also contends that the draft "no" vote result statement is inadequate, and should be modified to reflect the current law, including continued certification of unions as exclusive representatives without regard to their membership or dues structures. (*Id.*).

5. Our response to the comments

After consideration of the comments concerning the draft caption, we agree that the draft "yes" and "no" vote result statements should be revised. With respect to Ms. Neel's and Mr. Forest's argument that the "Yes" result statement should reflect that IP 62 affects the collection of dues is that are for political and ideological activities, for the reasons explained above, we disagree that that is an effect that must be included in the statement. Because the "no" result statement has been modified, we need not address their argument that the "no" vote result statement should clarify that public unions are currently able to collect dues as a condition of membership. With respect to Ms. Vaandering's, Mr. Lutz's, Ms. Conroy's, and Mr. Schwarz's objection that the "yes" result statement should be modified to explain the free-rider effect of IP 62, we disagree. However, we have modified the "yes" result statement to clarify that the measure will limit dues or fees that fund activities unrelated to limited representation or bargaining activities. We believe that other modifications to the result statements resolve Ms. Vaandering's and Mr. Lutz's objections to the words "member," "representation" and "collective bargaining." We agree that the "yes" result statement should notify voters that IP 62 authorizes lawsuits. We also agree that the "no" result statement should be modified to indicate that a union's representation extends to all members of a bargaining unit. We further agree that the statement should inform voters that unions may require all employees to share in the costs of legally required union representation. We believe other modifications resolve Mr. Schwarz's objections that the "no" result statement could more accurately reflect current law.

In light of our response above, we modify the "yes" and "no" vote result statements to read as follows:

Result of "Yes" Vote: "Yes" vote prohibits public employee union from requiring dues/fees for union activities unrelated to limited representation/bargaining; employee may authorize additional payments. Authorizes lawsuits.

Result of "No" Vote: "No" vote retains ability of public employee unions to require dues/fees for all union representation/bargaining activities, require member dues for other union activities.

D. The summary

We next consider the draft summary. A ballot title must include "[a] concise and impartial statement of not more than 125 words summarizing the state measure and its major effect." ORS 250.035(2)(d). "The purpose of a ballot title's summary is to give voters enough information to understand what will happen if the initiative is adopted." *McCann*, 354 Or at 708. The draft summary provides:

Summary: Currently, the Employment Relations Board may certify, or a public employer may recognize, a union as the "exclusive representative" of all employees in an appropriate bargaining unit of public employees. A union may use member dues for some costs unrelated to bargaining or representation. Payments nonmembers are required to make may be used only for costs related to bargaining or representation. Measure provides that Board cannot certify union as "exclusive representative" if it requires its members to make contributions that are spent on activities "not necessarily and reasonably incurred for the purpose of representation and collective bargaining." Measure permits union to separately collect itemized dues for activities unrelated to representation, collective bargaining only from its members who consent in writing to additional contributions. Other provisions.

We address the comments and objections below.

1. Comments from Ms. Neel and Mr. Forest

Ms. Neel and Mr. Forest reiterate their objection that the major effect of IP 62 is on member dues used for political and ideological activities unrelated to collective bargaining. (Rietmann Letter, 5-6). They also object that the draft summary fails to inform voters that fair-share fees may be used for political, ideological, and other non-collective bargaining purposes unless a nonmember takes affirmative steps to prevent it, and that nonmembers do not have the right to vote on their employment contract or otherwise have the same rights as members to participate in bargaining activities. (Rietmann Letter, 6). They also object to the word "some" costs, because it "implies there is a limit to the amount of member dues a union may use for purposes unrelated to collective bargaining or representation" and quantifies the amount spent on unrelated activities as "small." (*Id.*). Finally, they object that the statement, "Board cannot certify union … as exclusive representative" is underinclusive because Section 8(4) of IP 62 also prohibits a public employer from recognizing a union that does not comply with ORS 243.622 as an exclusive representative.

2. Comments from Ms. Vaandering and Mr. Lutz

Ms. Vaandering and Mr. Lutz object to the summary in multiple ways. First, they carry forward their objections to the caption and result statements. (Olney Letter, 15). They also contend that, 1) the first sentence is too long and the reference to the Employment Relations Board is unnecessary and potentially misleading, although they do not explain why. (*Id.*). 2) The second sentence oversimplifies the dues/"fair share" structure, and the third sentence is difficult to follow. (*Id.*). 3) The summary should note that unions establish membership terms. 4) The summary should simply describe the changes made by IP 62 and note that the effect is "unclear." (*Id.*). 4) The last sentence is inaccurate because any employee may make payments above representation fees. (*Id.*). 5) They object that the summary should inform voters that IP 62 dictates membership terms and that employees can stop paying membership fees at any time, that the measure creates a new cause of action, affecting ERB jurisdiction, and that it poses an unconstitutional attempt to limit legislative authority. (*Id.*).

3. Comments from Ms. Conroy

Ms. Conroy reiterates her objections, set out above, and further objects to the summary in three respects. First, she contends that the summary should not quote the phrase "necessarily and reasonably incurred for the purpose of representation and collective bargaining" or signal that it is "inconsistently defined." (Berman Letter, 9). Second, she argues that the summary should note that IP 62's impact on a union's ability to collect dues is unclear. (*Id.*). Third, she contends that the summary should inform voters that IP 62 poses an unconstitutional attempt to limit legislative authority. (*Id.*).

4. Comments from Mr. Schwarz

Mr. Schwarz objects that the summary contains all of the flaws he addressed concerning the other parts of the ballot title, and that the summary should be modified to explain that IP 62's "central theme is to require labor organizations to establish[] membership and limit dues for specific purposes and in specific manners." (Schwarz Letter, 12).

5. Conclusion

After consideration of the comments concerning the summary, we agree that it should be modified. First, we agree that the summary should explain the current obligations of public employee unions as to members and non-members and the requirement that non-members share representation costs. Second, we disagree that the summary should inform voters that unions establish membership terms, and should include the effect on the collection of money for purposes including "political and ideological activity." because those terms are not necessary for voters to understand the measure and its major effects. The revised summary explains that unions currently "may require dues from its members to fund expenditures related to all bargaining/representation and other union activity." It also explains that under the proposed measure, unions cannot require "payments that fund activities other than union bargaining/representation concerning 'employment relations'." Although they do not explicitly talk about membership terms, these provisions of the summary make it sufficiently clear that under this proposal unions would not be allowed to condition membership on payment of more

than the amounts allowed by IP 62. Third, we disagree that the summary should inform voters that union members may cancel membership and discontinue paying member fees at any time; the summary notes that other provisions exist and other more important effects of the measure on public employers and employees take priority for the limited space allotted for the summary. Fourth, we agree that the summary should inform voters that the measure authorizes enforcement lawsuits. Fifth, we disagree that the summary should inform voters that IP 62 poses an unconstitutional attempt to limit legislative authority; such a comment is inappropriate in the ballot title. We believe that other modifications to the result statements resolve the Mr. Schwarz's objections.

In light of our response above, we modify the summary to read as follows:

> **Summary:** Currently, public employees in a bargaining unit may be represented by a union. Union may require dues from its members to fund expenditures related to all bargaining/representation and other union activities. Collective bargaining agreements can require represented nonmembers to pay fees, but nonmembers cannot be required to pay fees for union activities unrelated to bargaining/representation. Measure prohibits requiring any dues/fees that fund activities other than union bargaining/representation concerning "employment relations" (defined). "Employment relations" includes all subjects on which unions, employers must bargain, but not all subjects on which they are allowed to bargain. Measure permits union to separately collect itemized payments for other representation/bargaining activities, and other union activities from employee who authorizes additional amounts. Authorizes enforcement lawsuits. Other provisions.

E. Conclusion

We certify the attached ballot title.

Si

Paul Smith
Deputy Solicitor General
paul.l.smith@doj.state.or.us

SAT:aft/6976235

Enclosure

Maggie Neel
P.O. Box 2111
Lebanon, OR 97355

Mike Forest
P.O. Box 7524
Salem, OR 97303

Richard Schwarz
3411 NW Vaughn Street
Portland, OR 97210

Nathan Rietmann
1270 Chemeketa St. NE
Salem, OR 97301

Steven C. Berman
Stoll Berne PC
209 SW Oak St., Ste. 500
Portland, OR 97204

Margaret Olney
Bennett Hartman Morris
210 SW Morrison St., Ste. 500
Portland, OR 97204

Certified by Attorney General on December 1, 2015.

Assistant Attorney General

BALLOT TITLE

Public employee union may require dues/fees only for limited representation/bargaining activities; authorizes lawsuits

Result of "Yes" Vote: "Yes" vote prohibits public employee union from requiring dues/fees for union activities unrelated to limited representation/bargaining; employee may authorize additional payments. Authorizes lawsuits.

Result of "No" Vote: "No" vote retains ability of public employee unions to require dues/fees for all union representation/bargaining activities, require member dues for other union activities.

Summary: Currently, public employees in a bargaining unit may be represented by a union. Union may require dues from its members to fund expenditures related to all bargaining/representation and other union activities. Collective bargaining agreements can require represented nonmembers to pay fees, but nonmembers cannot be required to pay fees for union activities unrelated to bargaining/representation. Measure prohibits requiring any dues/fees that fund activities other than union bargaining/representation concerning "employment relations" (defined). "Employment relations" includes all subjects on which unions, employers must bargain, but not all subjects on which they are allowed to bargain. Measure permits union to separately collect itemized payments for other representation/bargaining activities, and other union activities from employee who authorizes additional amounts. Authorizes enforcement lawsuits. Other provisions.

BENNETT, HARTMAN, MORRIS & KAPLAN, LLP

GREGORY A. HARTMAN
MICHAEL J. MORRIS
HENRY J. KAPLAN§
NELSON R. HALL
THOMAS K. DOYLE♦
ARUNA A. MASIH♦
SHARON MAYNARD
TALIA Y. STOESSEL
RICHARD B. MYERS

ATTORNEYS AT LAW
SUITE 500
210 S.W. MORRISON STREET
PORTLAND, OREGON 97204-3149
(503) 227-4600
FAX (503) 248-6800
www.bennetthartman.com

ROBERT A. BENNETT (RETIRED)
LINDA J. LARKIN*
MARGARET S. OLNEY*♦
PATRICIA A. ARJUN*♦
* OF COUNSEL
♦ ALSO MEMBER WASHINGTON BAR
§ ALSO MEMBER NEW YORK BAR

November 13, 2015

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SECRETARY OF STATE

Via email: irrlistnotifier@sos.state.or.us

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

Re. Initiative Petition 36 (2014) - Draft Ballot Title Comments
Our File No. 18600-33

Dear Secretary Atkins:

This office represents Hanna Vaandering and Trent Lutz, Oregon electors who wish to comment on IP 62 (2015). Ms. Vaandering is the President of the Oregon Education Association and Mr. Lutz is the Acting Executive Director of Public Affairs.

1. INTRODUCTION

In a state where public policies are often debated through the initiative process, the validity of unions has drawn a disproportionate share of attention. Anti-union measures have ranged from attacks on the use of payroll deductions to proposals purporting to "protect the right" of employees to not support the union. Notwithstanding these lofty statements, a common goal is to deplete union treasuries by allowing employees to receive union representation without sharing in the cost of that representation – i.e., they create "free riders." IP 62 is no exception. As discussed below, because the proposal allows employees to stop paying for representation at any time, without otherwise changing the union's duty to fairly represent all bargaining unit members, IP 62 allows "free riders." Under well-established Supreme Court precedent, this means that the ballot title must alert voters to this actual effect. *Towers v. Rosenblum*, 364 Or 125, 310 P3d 136 (2013), *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).

Unfortunately, the draft ballot title does not capture the free rider issue or otherwise accurately describe how the measure works. This is not surprising. Proponents often craft initiatives that appear to have one simple subject, such as "the right to not join or support a union," or "the right to represent oneself" that is then reflected in the draft ballot title. But the initiatives are neither as simple nor clear as they seem, which means that ballot titles that focus on surface changes are modified substantially based on the actual effect of a proposal in light of complex and interrelated laws governing collective bargaining. *See, e.g.* IP 35 (2016) (draft ballot stated unequivocally that union would not be required to represent nonmembers; certified ballot title substantially revised after commenters explained that Oregon's law banning discrimination based on union membership would necessarily mean that nonmembers be paid the same as members.); *see also,* IP 9 (2014) (certified ballot title incorrectly focused exclusively on the ban on requiring employees to pay any money to the union, without explaining that these employees would still receive the benefit of representation for free. *Towers v. Rosenblum, supra.).*

Below, commenters will first describe relevant current law and then describe how the proposal changes that law. They will then turn to the specific concerns with the draft ballot title.

2. CURRENT LEGAL FRAMEWORK

Oregon's Public Employee Collective Bargaining Act (the PECBA) was enacted in 1973. ORS 243.650 *et seq* . Like its federal counterpart in the National Labor Relations Act ("NLRA"), the PECBA establishes a complex system under which employees can elect to have a union represent them. The Oregon Employment Relations Board ("ERB") is responsible for enforcing the PECBA, through both rulemaking and contested case proceedings. ORS 243.766.

A. Appropriate Bargaining Unit

The first step in the process is for a union to be certified as the exclusive bargaining representative of an "appropriate bargaining unit" of employees. The statute gives ERB the authority to define the appropriate bargaining unit. ORS 243.682. In making that determination, ERB considers a variety of factors, including "community of interest, wages, hours, working conditions of the employees involved, history of collective bargaining and the desires of employees. ORS 243.682; OAR 115-025-0050(1) (further defining "community of interest" to include "similarity of duties, skills, benefits, interchange or transfer of employees, promotional ladders, common supervisor, etc."). Typically, the scope of the bargaining unit is defined primarily by job classifications. Status as a full-time or temporary employee is another common distinguishing factor. *Id.; See also, Labor and Employment Law: Public Section,* OSB CLE 2011, Chapter 3. As discussed below, under well-established law, an employee cannot be required to join the union, but employees whose positions are within the bargaining unit

remain bargaining unit members even if they choose not to join. These employees are often referred to as "covered employees" and are typically required to pay dues or "payments-in-lieu-of-dues," commonly known as "fair share" fees. *See*, ORS 243.650(10) and (18).

B. Union's Duties as Exclusive Bargaining Representative

Once the appropriate bargaining unit is defined and a majority of the employees in that unit chose to be represented, the law imposes a number of rights and responsibilities on both the union and the employer. First, the union becomes the exclusive bargaining representative for all employees in the unit. *Carlson v. AFSCME*, 73 Or App 755, 758, 700 P2d 260, *rev. den.* 300 Or 332 (1985). In that capacity, it must fairly represent all members of the bargaining unit without hostility or discrimination, regardless of union membership. Often referred to as the "duty of fair representation," this duty is grounded in ORS 243.672(2)(a), which makes it unlawful for a union to "interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under ORS 243.650 to 243.782." *Putvinskas v. SWOCC Classified Federation, AFT and SWOCC*, 18 PECBR 882, 894 (2000); *See also, Vaca v. Sipes*, 396 US 171, 64 LRRM 2369 (1967) and *Airline Pilots v. O'Neill*, 499 US 65, 136 LRRM 2721 (1991). The right to choose whether or not to join the union is a core protected right under both constitutional and statutory labor law principals. U.S. Const., Am. 1; ORS 243.662; *see also, Sizemore v. Myers/Terhune, supra; Dale v. Kulongoski, supra.* The duty applies to representation for both negotiations and contract enforcement and exists independently of any desire by a bargaining unit member to receive representation.

C. Fair Share Agreements

Because the law places significant duties on unions towards all bargaining unit members, 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. ORS 243.666. Under a "fair share agreement," union members pay dues, non-union members pay fees-in-lieu-of-dues. ORS 243.650(10) and (18).[1] These agreements are allowed in order to avoid the "free rider" problem. *See*, Hardin, *The Developing Labor Law*, 3rd Ed. (1992), Chapter 26 and cases cited therein. As the U.S. Supreme Court explained in the leading case on the subject:

> The designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of

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[1] In the private sector, these agreements are generally referred to as "union security" agreements.

> much time and money. The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required. Moreover, in carrying out these duties, the union is obliged "fairly and equitably to represent all employees, . . . union and non-union," within the relevant unit. *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.*

Abood v. Detroit Board of Education, 431 U.S. 209, 97 S. Ct. 1782, 52 L.Ed.2d 261, 95 LRRM 2411, (1977) (Citations omitted, emphasis added.)

To ensure that employees are not required to pay for political or ideological activities to which they may have objections, the law requires all unions to follow a specific and detailed procedure that allows non-members to refuse to pay for expenses that are not germane to or supportive of the negotiations and contract enforcement. *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Elvin v. OPEU*, 11 PECBR 9 (1988), *aff'd*, 102 Or App 159 (1990), *aff'd*, 313 Or 165 (1992). Expenditures that relate to representation are deemed "chargeable" and all other expenditures are deemed "non-chargeable" and therefore cannot be collected over an employee's objection. *Carlson v. AFSCME*, 73 Or App 755, 761, 700 P2d 260 (1985); *Ebersole v. Mollala Education Ass'n/OEA/NEA*, 15 PECBR 160, 179 (1994). The Employment Relations Board is charged with determining whether a challenged expenditure is "chargeable" or "nonchargeable."

D. Union Membership Status

Public employee unions, as independent organizations, have the right to define membership standards and requirements. *See, e.g. Burkhart v. OPEU*, 14 PECBR 150 (1992) (upholding validity of internal policies authorizing member discipline). For example, they can limit membership to those employees who ask to join and who pay full dues, i.e., pay for both representation activities and so-called "political and ideological" activities of the union. Unions can then limit the availability of certain benefits to members, so long as those benefits do not flow from the collective bargaining agreement itself. Common benefits include group discounts for insurance, financial services and educational programs, as well as extra liability insurance. Finally, the union can provide that only members get to vote in any governance election, including electing leaders or ratifying contracts.

E. Employer's Duties to Not Treat Bargaining Unit Members Differently Based on Union Activity or Status

The PECBA also imposes significant obligations on employers once a union is recognized. In addition to the key obligation to bargain in good faith,[2] the PECBA prohibits differential treatment of employees based on protected union activity. ORS 243.672(1)(a),(b) and (c). *See, Labor and Employment Law: Public Sector*, OSB CLE 2011, Chapter 8 for overview of union anti-discrimination laws. While most cases challenge detrimental or adverse action by the employer, promises of favoritism can also be unlawful. *ONA v. OHSU*, 19 PECBR 590, 594 (2002). This means that, irrespective of the union's duty of fair representation, the public employer is required to pay nonunion members the same wages, salaries and other employment benefits as union members, typically those negotiated in the applicable collective bargaining agreement.

F. Enforcement of PECBA

Under current law, the Employment Relations Board has exclusive jurisdiction over all public sector labor law disputes that involve interpreting the PECBA. *Ahern v. Oregon Public Employees Association*, 329 Or 428, 988 P2d 364 (1999). As the court explained in *Ahern*, exclusive jurisdiction is necessary to avoid inconsistent results. Allegations that either an employer or union has violated the terms of the statute must be pursued as unfair labor practices.[3] ORS 243.672(1) and (2). This would include allegations that a union has violated its duty of fair representation, for example, by failing to pursue grievances or bargain adequate employment terms. If ERB finds a violation, it can grant "affirmative relief," such as an order requiring that

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[2] One of the bedrock principals of the PECBA is that both the employer and union have an obligation to "bargain in good faith." ORS 243.656(5); ORS 243.672(1)(e) and ORS 243.672(2)(b). In determining the scope of that obligation, ERB has generally followed federal law and distinguished between "mandatory," "permissive" and "prohibited" subjects of bargaining. Mandatory subjects are those defined as "employment relations" under ORS 243.650(7): "direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment." Whether a subject falls within the definition (i.e., is a "condition of employment") is the source of extensive litigation. In lay person's terms, the focus is on whether the subject of the proposal impacts management prerogatives more than the employee's conditions of employment. If a subject is "permissive," an employer may still discuss it with the union, but is not required to do so. Common examples of permissive subjects that are negotiated include standards for evaluations, ground rules for bargaining, and assignment of duties. If a proposal is inconsistent with a law, then it is "prohibited" and cannot be the subject of bargaining. *See, Labor and Employment Law: Public Section*, OSB CLE 2011, Chapter 6.3 for more complete discussion of subjects of bargaining. Whether an expenditure is "chargeable" to fair share fee payers does not turn on whether a representation activity concerns a mandatory subject of bargaining. *See, Ebersole, supra.*, 15 PECBR 15 183.

[3] The only time an employer may go to court instead of ERB is if a strike "creates a clear and present danger or threat to the health, safety or welfare of the public." ORS 243.726(3). Commenters are aware of only one time this has occurred. *See* https://olis.leg.state.or.us/liz/2013R1/Downloads/CommitteeMeetingDocument/7509; http://www.oregonlive.com/business/index.ssf/2012/11/judge_declines_to_forbid_longs.html

the violation cease and the employee made whole. In addition, ERB has authority to award limited representation costs and attorney fees to the prevailing party before ERB and on appeal. ORS 243.676; OAR 115-035-0055 and 0057. In exceptional circumstances, ERB may issue a "civil penalty" of up to $1000 and award higher representation costs/attorney fees. ORS 243.676; OAR 115-35-0075; OAR 115-35-0055(a) and 115-35-0057(c). ERB's jurisdiction includes resolving questions about whether a particular expenditure is "chargeable," *i.e.*, "necessarily or reasonably incurred for the purpose of representation and collective bargaining. *See, e.g. Ebersole v. Mollala Education Assn/OEA/NEA, supra.*

Because of ERB's exclusive jurisdiction, there are no existing causes of action that can be filed in circuit court, nor any right to damages.

3. **CHANGES MADE BY IP 62**

A. Limits Fair Share Agreements and Allows Free Riders

To understand IP 62's actual effect, it is important to highlight what IP 62 does and does not change. First and foremost, IP 62 does not change any of the provisions relating to non-discrimination and the duty to represent; the union remains obligated to represent all covered employees in the bargaining unit. IP 62 does change, however, what the union can charge covered employees for that representation or membership dues. It also grants covered employees the absolute right to withdraw payment of even those limited costs and dues at any time. The combination of these provisions results in the classic free rider problem as follows.

Under IP 62 Section 5(1), public employee unions are prohibited from compelling "any public employee to pay member dues or other money as a condition of joining and participating as a member in the representation and collective bargaining activities of the labor organization if any portion of those dues may be used by the labor organization to pay for, or subsidize, political or ideological activities or any expenditures that are not necessarily and reasonably incurred for the purpose of representation and collective bargaining with the employee's public employer on matters concerning employment relations." Section 3(2)(a)and (b), in turn, grant public employees the right to make only such limited payments and still join and fully participate in the union. By definition, therefore, under IP 62, a union cannot condition membership on the payment of any money other than limited representation costs (as defined). Finally, Section 3(2)(c) grants individual public employees "[t]he right to cancel membership in a labor organization recognized as an exclusive representative, and discontinue paying all member dues or other money required as a condition of membership, at any time." And, because that right must be protected (Sections 4(1) and 5(2)) and the union's obligation to represent and not discriminate remains (ORS 243.672(2)(a)), any covered employee who withdraws support will still be entitled to receive all of the wages, benefits and other terms and

conditions of employment that are set out in the collective bargaining agreement—*i.e.*, the right to be a free-rider.

So, for example, although a school district and a union could agree in their collective bargaining agreement to deduct from the paychecks of all bargaining unit members the limited representation costs (as defined) by Sections 5 and 3(2)(a) and (b), any teacher covered by that contract could at any time exercise her right under Section 3(2)(c) to stop making those payments. In that event, neither the school district nor the union could deny the teacher all the other wages and benefits owed to covered employees under the contract. In fact, to try to bargain around that right is expressly prohibited. Sections 4(1) and 5(2).

The free rider problem is further exacerbated by the fact that to the extent IP 62 authorizes agreements to deduct some money to cover certain union bargaining and representation expenditures, the scope of permissible expenditures is arguably much more limited than what has historically been deemed "chargeable" under "fair share agreements." This is because IP 62 only permits agreements that cover representation and collective bargaining expenditures *on matters concerning employment relations*." (Emphasis added).[4] "Employment relations," in turn, only refers to "mandatory" subjects of bargaining. Currently, collective bargaining can and often does extend to permissive issues and expenditures related to those activities are deemed chargeable. But under IP 62, a public employee union would arguably be prohibited from spending money on bargaining permissive items or enforcing any agreements regarding a permissive item. Section 5.

In sum, while it may be lawful for a public employer and union to enter agreements *authorizing* payroll deductions, they may only do so to cover these more limited "representation" costs, and those agreements can be trumped at any time by an employee who says "I don't want to pay." This makes it possible for any covered employee to be a "free rider" at any time. As discussed below, the ballot title must make that clear.

B. Union Membership

IP 62 gives all covered employees the right to be a union member if they pay for representation, as discussed above. That is, under section 2(3)(b) and section 5(1), a union cannot condition membership on the payment of any money other than expenditures that are "necessarily or reasonably incurred for the purpose of representation and collective bargaining

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[4] The scope of permissible "representation costs" under IP 62 is further confused by the definition of the phrase "necessarily and reasonably incurred for the purpose of representation and collective bargaining" set out in Section 8(2). That section states that the phrase "is a term of legal are intended to refer, depending on context, to activities and expenditures that *either are or are not* germane to collective bargaining." (Emphasis added). That is a singularly unhelpful definition that muddies the actual effect of the proposal even more.

with their employer on matters concerning employment relations." In addition, such members have the right to participate in any activity related to representation, such as voting for union officers or ratifying a contract. This provision infringes on the well-established principal that private membership associations have a constitutional right under the First Amendment to set their own membership terms. *See, e.g. United Mine Workers v. Illinois Bar Ass'n*, 389 US 212, 223-25 (1967) (affirming right of labor union to provide legal services relating to workers compensation claims to members under First Amendment, explaining "[w]e have therefore repeatedly held that laws which actually affect the exercise of these vital rights [of association, assembly and speech] cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil.").

C. Individual Authorization for "Non-Chargeable" Expenditures

Section 6 requires unions to obtain individual written consent on a prescribed form in order to collect any money from a covered employee other than for the costs of representation relating to employment relations, as discussed above.

D. Enforcement

Section 7 creates an entirely new right of action in circuit court authorizing any bargaining unit member to sue the union to enforce the provisions of the measure without demonstrating injury. The court may award damages as well as equitable relief, and is required to award attorney fees and costs to a "prevailing" public employee. The statute thus divests the Employment Relations Board of its exclusive jurisdiction to decide such matters as whether a disputed subject is germane to collective bargaining over a mandatory subject of bargaining. This represents a significant departure from current law, which the Supreme Court has expressly held bars actions in civil courts that might require interpretation of the PECBA. *Ahern, supra.* at 436-437.

E. Miscellaneous

Section 8 expresses an intent to enshrine existing definitions of key labor law terms in statute, unless they are amended by a vote of the people. Of course, because IP 62 purports to be a statutory initiative, this kind of limitation on legislative authority is unconstitutional and unenforceable. The legislature retains authority to amend any statute. *See, e.g. Macpherson v. Department of Administrative Services*, 340 Or 117, 126 (2006). The inclusion of this language thus creates procedural constitutional problems which are addressed separately by comments submitted by Heather Conroy and incorporated by this reference.

4. DRAFT BALLOT TITLE

A. 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 has 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 Attorney General issued the following draft ballot title:

> Public employee union cannot collect dues for uses other than representation, bargaining without member authorization.

This caption is inaccurate and incomplete and must be substantially revised. The fundamental problem is that it fails to tell voters the "true subject" or "actual effect" of the proposal – to allow employees to receive the benefits of union representation without cost. This is a fatal flaw. The Oregon Supreme Court has directed the Attorney General to look behind the words of a measure to determine the proposal's "actual effect." *Rasmussen, supra.* More specifically, the court has repeatedly held that the caption for a measure that would allow free riders must identify that key major effect in order to comply with statutory standards, even when the proposal makes other changes. *See, e.g. Towers v. Rosenblum*, 364 Or 125, 310 P3d 136 (2013), *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).

Most recently, in *Towers v. Rosenblum*, the court reviewed a ballot title for IP 9 (2014) that failed to describe the free rider effect. The certified caption read, "Prohibits compulsory payment of union representation costs by public employees choosing not to join union." In that case, the Attorney General argued that her caption clearly identified the proposal's subject matter – the prohibition on requiring "payments-in-lieu-of-dues" – i.e., the facial changes made by the proposal. The court rejected that argument, emphasizing that prior decisions were clear that the Attorney General must examine the actual effect. The court explained:

> This case is controlled by our prior decisions in *Novick/Bosak* and *Sizemore/Terhune*. As in both of those cases, the measure at issue in this one would, if adopted, declare a right not to be required to join a labor organization as a condition of employment and a right not to pay dues, fees, or other charges to such labor organizations. As in both of those cases, an "actual major effect" is that employees who choose not to be represented will be able to receive services from a labor organization without having to pay for them. And, as in both of those cases, the Attorney General's certified ballot title caption is deficient for failing to identify that actual major effect.

Towers v. Rosenblum, 354 at 130-31.

The same analysis applies here. Section 3(2)(c) gives all covered the employees the right to not be a member or pay any money required to be a member – i.e. representation costs -- at any time. But the proposal does not otherwise change current law requiring unions to represent all bargaining unit members. Therefore, an "actual major effect" is that employees can, at any time, "receive services from a labor organization without having to pay for them." *Towers, supra.* The draft ballot title fails to identify that actual major effect and must therefore be revised.

The second major problem with the draft caption is that it fails to tell voters that the proposal creates a new right of action in circuit court to enforce the provisions of the proposal. The court has repeatedly held that voters should be informed of all significant changes in current law, including changes in enforcement schemes, where those changes are not "mere procedural details" but rather substantive. *Greenberg v. Myers*, 340 Or 65, 70, 127 P3d 1192 (2006); *Sizemore v. Myers/Terhune*, 342 Or at 587-588 ("We conclude that the extensive enforcement provisions in the proposed measure represent major changes in Oregon law that "likely would be significant to the voting public.") As in *Sizemore v. Myers/Terhune*, the remedial scheme established by IP 62 is new and fundamentally inconsistent with the current law and not "mere procedural detail." Currently, the Employment Relations Board has exclusive jurisdiction to interpret and enforce all disputes arising out of the PECBA. This rule ensures that decisions are made consistently and by a tribunal that has specialized knowledge of labor law. *Ahern, supra.* But under this proposal, circuit court judges are authorized to decide core questions of law, such as a whether an negotiation expenditure "concerns employment relations," and then award damages, injunctive relieve and mandatory prevailing plaintiff attorney fees. Accordingly, as the court directed in *Sizemore v. Myers/Terhune*, this new enforcement mechanism must be identified in the caption.

The third problem is that the reference to dues for "representation" is misleading. As discussed above, by limiting permissible expenditures to negotiations and collective bargaining *concerning employment relations*, IP 62 appears to prohibit the collection of fees for activities that have historically been considered "chargeable" expenditures related to negotiations and contract enforcement. For example, a teachers union might propose restricting the ability of employers to rely on student test scores in evaluations, an arguably permissive subject. Or it might seek arbitration over a dispute concerning class size, also an arguably permissive subject. Under IP 62, neither of those activities would be deemed "representation" activities, which renders the reference to "representation" misleading and overbroad.

Finally, the reference to "member" in the second clause is inaccurate. Under the proposal, a union can collect money from any covered employee for expenditures that are unrelated to representation (as defined), with authorization. Union membership is irrelevant. Section 7.

The following alternative corrects these deficiencies:

> Allows public employees to receive union representation without paying costs; authorizes lawsuits, attorney fees

This alternative plainly describes the most significant actual major changes made by the proposal in terms that will be readily understood. It tells voters that employees will be able to receive representation for free, and also alerts them to the new enforcement scheme. It is thus consistent with the court's decision in similar cases. *Towers v. Rosenblum, supra; Sizemore/Terhune v. Myers, supra.* As in those cases, other changes made the proposal are secondary and can be described in the remainder of the ballot title.

B. 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). 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 public employee union from collecting dues from any member to fund activities

> unrelated to representation or collective bargaining, unless authorized by member."

This draft statement suffers from the same shortcomings as the caption. First, it fails to identify the free rider issue, which is one of the key results of passage and therefore must be identified for voters. Again, if an employee can choose to stop paying any money to the union at any time yet still receive representation (*i.e.* the negotiate employment terms and representation in contract disputes), he or she is a "free rider." Second, the unqualified reference to "representation" and "collective bargaining" is misleading, since the scope of those terms under IP 62 is narrower than what is commonly understood. Third, as with the caption, the draft statement conflates employee with member.

In addition, the draft "yes" vote result statement fails to mention changes that would be of significant importance to voters. This includes the failure to mention the change in membership rules, as well as the entirely new enforcement scheme.

To correct these problems, we propose the following, which builds on our proposed caption:

> **RESULT OF "YES" VOTE:** "Yes" vote allows public employees to refuse to share cost of required union representation; prohibits other payroll deductions without authorization; changes membership rules; authorizes lawsuits.

This alternative identifies all of the major changes made by the proposal. It begins with a plain statement of the free rider issue that accurately reflects the fact that covered employees can at any time refuse to pay any money to the union. The next clause identifies the individual authorization requirement for certain other payroll deductions (those unrelated to representation and collective bargaining on matters concerning employment relations). We have used "other" in juxtaposition to "costs of union representation" to signal the broad category of payroll deductions for which authorization is required; an accurate and more detailed description is impossible within the word limits. On this point, it is important to note that any use of the terms "political" or "ideological" would be inaccurate and underinclusive. While the phrase has historically been used as shorthand for non-chargeable expenses, the requirement for separate authorization set out in Section 6 of IP 62 applies to a broad catchall category: every expenditure that is not "necessarily and reasonably incurred for the purpose of representation and collective bargaining on matters concerning employment relations" (with the exception of certain incidental member benefits). *See, Ebersole, supra,* 15 PECBR at 179 ("As used by the courts, the terms ["political" and "ideological"] have become a sort of generic umbrella encompassing all bases for objecting to the use of fair share fees for activities other than those germane to collective bargaining."). Under IP 62, this would include expenditures

such as charitable contributions and community service, as well as expenditures relating to representation activities concerning permissive subjects of bargaining.[5] None of those expenditures can reasonably be characterized as "political and ideological."

Finally, this alternative alerts voters to the fact that the proposal changes membership rules and authorizes an entirely new cause of action.

C. 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 existing ability of public employee union to collect dues from members for union purposes not directly related to representation or collective bargaining.

This statement is misleading and fails to describe the law most relevant to the *status quo*. First, as set forth above, current law authorizes agreements between a public employer and public employee union to collect dues or payments-in-lieu-of-dues from all covered employees (i.e., bargaining unit members). The union does not have the ability to collect dues unilaterally, as suggested by the draft "no" statement.

Second, under current law, covered employees cannot be required to pay for expenditures other than costs germane to negotiations and contract enforcement. IP 62 changes this law by only permitting "fair share" agreements to cover certain representation costs, but then authorizing employees to not even pay that amount. The proposal also requires specific authorization from members and nonmembers alike for any other payment to the union. The draft statement is inadequate and misleading in describing relevant current law on this point because it only references "members" and fails to describe the ability of public employers and

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5 For a more detailed discussion of chargeable and nonchargeable expenses under current law see *Labor and Employment Law: Public Sector*, OSB CLE 2011, Chapter 10.2. For a listing of permissive subjects of bargaining see *Labor and Employment Law: Public Sector*, OSB CLE 2011, Chapter 6.3.

unions to negotiate agreements to require all employees to share in the costs of legally required union representation.

Finally, IP 62 prescribes union membership terms; unions cannot require the payment of money in addition to representation costs (as defined) as a condition of membership. Under current law, the union gets to set membership terms. That law should be referenced. We propose the following:

> **RESULT OF "NO" VOTE:** "No" vote retains current law allowing negotiated agreements requiring union-represented public employees to share representation costs, but not other expenditures; unions set membership terms.

D. 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, the Employment Relations Board may certify, or a public employer may recognize, a union as the "exclusive representative" of all employees in an appropriate bargaining unit of public employees. A union may use member dues for some costs unrelated to bargaining or representation. Payments nonmembers are required to make may be used only for costs related to bargaining or representation. Measure provides that Board cannot certify union as "exclusive representative" if it requires it members to make contributions that are spent on activities "not necessarily and reasonably incurred for the purpose of representation and collective bargaining." Measure permits union to separately collect itemized dues for activities unrelated to representation, collective bargaining only from its members who consent in writing to additional contributions. Other provisions.

The draft summary fails to meet the statutory standards for the reasons discussed above. It does not adequately or accurately describe relevant current law, how the measure works or its major effects. More specifically:

- The first sentence, while accurate, spends too many words describing the "exclusive representative" status, which is unchanged by the proposal. It is also unnecessary and potentially misleading to call out the Employment Relations Board.
- The second sentence oversimplifies the dues/fees-in-lieu of dues structure. Under current law, a portion of both member dues and nonmember "fees-in-lieu-of-dues" can be spent on "nonchargeable" activities. However, nonmembers who object cannot be required to pay for anything other than chargeable expenditures. This sentence incorrectly focuses exclusively on members. The third sentence is accurate, but difficult to follow.
- The description of current law also needs to note that unions establish membership terms, so that voters will understand the significance of the changes made by IP 62.
- The description of the changes made by IP 62 set out in the fourth and fifth sentence are inadequate and inaccurate. It is unnecessary to reference certification by ERB to understand the breadth of the changes made. Word space can be saved by simply describing the changes. It is also unnecessary to quote the "necessarily and reasonably incurred" language in order to convey the gist of the proposal on this issue. This is particularly true given the bizarre and contradictory definition set out in section 8(2). Inclusion of the definition requires a statement that the effect is unclear.
- The last sentence inaccurately states that only "members" can authorize additional "dues" to the union. Payments above "representation" fees can be made by any employee, not just members. Moreover, such payments are not "dues," since membership dues are limited to representation costs (as defined).
- The summary impermissibly omits a description of other key changes made by IP 62. No mention is made of the fact that the proposal dictates membership terms (membership dues cannot be greater than the amount necessary to defray certain representation activities, with payment of that money entitling the employee to membership), or the fact that employees can stop paying that money at any time. It also makes no mention of the fact that the proposal creates an entirely new cause of action in circuit court, which is antithetical to the current enforcement scheme giving ERB exclusive jurisdiction to interpret the PECBA. Finally, it fails to reference the unconstitutional attempt to limit legislative authority. This change is significant and must be identified in the summary.

To correct these problems, we propose the following alternative:

> **Summary:** Current law allows public employees to bargain collectively; union must fairly represent all employees in bargaining unit (in negotiations and contract enforcement), regardless of union membership; allows collective bargaining agreements authorizing payroll deductions for member dues, nonmember payments-in-lieu-of-dues; employees can be required through collective bargaining agreement to share costs of legally required union representation, but not other union expenditures; union sets membership terms. Measure only permits negotiated agreements to collect money for certain representation activities; requires prescribed authorization to collect money for other purposes; limits certain legislative amendments (effect unclear). Union must accept as member any employee who pays "representation costs" (as defined); cannot require additional payments. Employees can withdraw membership, union payments, and still receive union representation. Authorizes lawsuits, damages, attorney fees. Other changes.

5. **CONCLUSION**

Commenters recognize that crafting accurate ballot titles in the short time frame available is extremely challenging, particularly with proposals such as IP 62 that are deceptively complicated, with effects that are not immediately apparent. Where, as here, one of those effects is to allow employees to receive the benefits of union representation for free, the Supreme Court has made clear that the caption and remainder of the ballot title must identify that effect. The draft ballot fails to do so. It must be revised to include the free rider concept and to correct the other identified inaccuracies.

Thank you for your careful consideration of these comments.

MSO:kaj
cc: Clients

1270 Chemeketa St. NE
Salem, Oregon 97301

Email: nathan@rietmannlaw.com
Ph: (503) 551-2740

Nathan R. Rietmann
Attorney at Law

November 13, 2015

Honorable Jeanne P. Atkins
Oregon Secretary of State
Elections Division
255 Capitol St. Suite 501
Salem, Oregon 97310

RE: IP 62 – Chief Petitioner Comments

Dear Secretary Atkins:

My office represents Maggie Neel and Mike Forest who are the chief petitioners for IP 62. Petitioners Forest and Neel appreciate the opportunity to submit comments on Attorney General's draft ballot title in their individual capacities as interested persons and Oregon electors.

THE CHIEF PETITIONERS

Petitioners strongly believe in collective bargaining for public employees and have spent decades advocating for unions and union members.

Petitioner Neel has been a union activist for 27-years and currently advocates for members as an elected member of the statewide Board of Directors for *Service Employees International Union Local 503, Oregon Public Employees Union* (SEIU Local 503, OPEU). Also, from 2002 to the present, Petitioner Neel has advocated for members as an elected member of SEIU Local 503, OPEU's General Council, which is the highest governing body of the union. Petitioner Neel has also served six-years as past president of Oregon State University (OSU) Local 083 and spent 12-years advocating for members as a union steward. In addition to working for members through union leadership, Petitioner has fought for members directly at the bargaining table and served as an alternate chair or table representative for five Oregon University System contracts, including at central table.

Petitioner Forest is an employee of the Oregon Department of Agriculture and also a 27-year union member. During this time, he has consistently advocated for members' rights and fought for union members as union steward and as the president of

Nathan R. Rietmann
Attorney at Law
1270 Chemeketa St. NE
Salem, Oregon 97301
503-551-2740
nathan@rietmannlaw.com

two locals. Presently, Petitioner Forest advocates for union members as an elected member of General Council – the highest governing body of SEIU Local 503, OPEU.

THE PURPOSE AND EFFECT OF IP 62

Under Oregon's system of collective bargaining, the State of Oregon designates or recognizes a single public employee union to serve as the exclusive representative of all public employees within an appropriate bargaining unit. ORS 243.666. Public employees must join the public employee union designated as their exclusive representative in order to vote on their employment contract and otherwise exercise the full collective bargaining rights of a union member.

Public employee unions exist and are recognized by the State of Oregon for the purpose of collective bargaining with public employers. ORS 243.622. However, public employee unions increasingly engage in political, ideological, and other activities *unrelated to collective bargaining.* For example, in 2016, Petitioners' union expects to spend approximately 20% of its members' dues on political, ideological, and other activities unrelated to collective bargaining. *See,* Exhibit A.

Currently, public employee unions finance their political, ideological, and other non-collective bargaining activities with mandatory dues that public employees must pay in order to join the union. For example, Petitioners' union, SEIU Local 503, OPEU, takes 75 cents out of each member's monthly dues and transfers the money to its political action committee ("Citizen Action for Political Education" also known as "CAPE"). However, less than 16% of its state employee members, and less than 27% of all members, voluntarily contribute to SEIU Local 503, OPEU's political action committee. *See,* Exhibit B. Petitioners' union also takes nearly $7 million dollars per year out of its mandatory members' dues in the form of a "per capita tax" and transfers the money to SEIU International Union in Washington D.C., which uses the money mostly for political, ideological, and other activities unrelated to collective bargaining on behalf of its Oregon public employee members. *See,* Exhibit C Page 2[1].

When public employee unions finance political, ideological, and other non-collective bargaining activities with mandatory membership dues, Oregon public employees are compelled to financially support these unrelated political and ideological activities in order to vote on their contract and exercise the other collective bargaining rights of a union member. Public employees who exercise their First Amendment right against compelled speech and do not join the union lose the right to vote on their employment contract or otherwise participate in collective bargaining as a union member.

[1] Department of Labor rules for reporting political expenditures on federal annual LM2's differ from rules governing what amounts must be identified and rebated by public employee unions to objecting nonmembers who request refunds of non-germane political, ideological and other expenditures.

Nathan R. Rietmann
Attorney at Law
1270 Chemeketa St. NE
Salem, Oregon 97301
503-551-2740
nathan@rietmannlaw.com

In other words, public employees who are unwilling to financially support their union's political, ideological, and other non-collective bargaining activities have their voices silenced in collective bargaining.

Petitioners are proposing IP 62 to prohibit public employee unions from using their power as exclusive representatives to compel financial support for political, ideological, and other non-collective bargaining activities. IP 62 does this by ensuring that no public employee is required to pay money that will be used for political, ideological, or other non-collective bargaining activities in order to join and fully participate as a member in the collective bargaining activities of their union. If IP 62 is enacted, public employee unions may still engage in political, ideological, and other activities unrelated to collective bargaining, just as they do today. The only difference is they will need to rely on *voluntary* member contributions for those unrelated activities.

Petitioners anticipate the change that IP 62 proposes will have three practical effects. First, by enabling public employees to speak with their wallet and have a stronger voice in their union, IP 62 will cause union political and ideological activities to be more closely aligned with the political and ideological views of their members. Second, IP 62 will increase union membership by enabling public employees to join and participate in the collective bargaining activities of their union without being compelled to financially support unrelated political and ideological activities they oppose. Third, by increasing membership and strengthening member voices, IP 62 will result in stronger unions that better serve their members.

SPECIFIC COMMENTS ON DRAFT BALLOT TITLE

A. Caption

A ballot title must contain "[a] caption of not more than 15 words that reasonably identifies the subject matter of the state measure. ORS 250.035. The "subject matter" of a measure refers to "the 'actual major effect' of a measure or, if the measure has more than one major effect, all such effects (to the limit of the available words)." *Whitsett v. Kroger,* 348 Or. 243, 247, 230 P.3d 545 (2010). To identify the "actual major effect" of a measure, the court looks to "the text of the proposed measure to determine the changes that the proposed measure would enact in the context of existing law" and then evaluates whether the caption reasonably identifies those effects. *Rasmussen v. Kroger,* 350 Or. 281, 285, 253 P.3d 1031 (2011). In fulfilling the statutory requirements, the caption must identify the measure's subject matter in terms that will not "confuse or mislead potential petition signers and voters," *Mabon v. Myers,* 332 Or. 633, 637, 33 P.3d 988 (2001), and it cannot overstate or understate the scope of the legal changes that the measure would enact. *Kain/Waller v. Myers,* 337 Or. 36, 40, 93 P.3d 62 (2004).

The Attorney General's draft caption reads:

Nathan R. Rietmann
Attorney at Law
1270 Chemeketa St. NE
Salem, Oregon 97301
503-551-2740
nathan@rietmannlaw.com

Public employee union cannot collect dues for uses other than representation, bargaining without member authorization

Although the Attorney General is correct that IP 62 affects the collection of all member dues used for purposes unrelated to representation and collective bargaining, the actual *major* effect of IP 62 is on the collection of dues that are for *political* and *ideological* activities unrelated to collective bargaining. The text of the measure makes this clear and this is by far the most significant change the measure would make in the context of existing law. Thus, while the Attorney General's draft caption is accurate, it fails to reasonably inform voters that the actual *major* effect is on the collection of member dues that are used for *political* and *ideological* purposes unrelated to collective bargaining and should be revised accordingly.

Petitioners respectfully request certification of one of the two proposed alternative captions set forth below:

1st Alternative: Public employee union cannot collect dues for political, ideological, other non-collective bargaining activities, without authorization.

2nd Alternative: Public employee unions must obtain member authorization to make political or ideological expenditures from dues.

B. Results Statements

The "yes" and "no" results statements are required to contain a simple and understandable statement of not more than 25 words that describes the result if the measure is approved or rejected. ORS 250.035.

The Attorney General's draft "yes" and "no" results statements read:

> **Result of "Yes" Vote:** "Yes" vote prohibits public employee union from collecting dues from any member to fund activities unrelated to representation or collective bargaining, unless authorized by member.
>
> **Result of "No" Vote:** "No" vote retains existing ability of public employee unions to collect dues from members for union purposes not directly related to representation or collective bargaining.

The purpose of the "yes" result statement is to "notify petition signers and voters of the result or results of enactment that would have the greatest importance to the people of Oregon." *Schoenheit v. Rosenblum*, 356 Or 783, 786-87, 345 P3d 436, 437-38 (2015).

The result of IP 62 that will have the greatest importance to the people of Oregon is that it will prohibit public employee unions from collecting dues that are used for

Nathan R. Rietmann
Attorney at Law
1270 Chemeketa St. NE
Salem, Oregon 97301
503-551-2740
nathan@rietmannlaw.com

political and *ideological* activities unrelated to collective bargaining without the consent of individual members. Therefore, and especially if this effect is not reflected in the caption as Petitioners have proposed, the "yes" vote results statements should be revised to notify voters of the effect IP 62 will have on the collection of dues used for *political* and *ideological* activities unrelated to collective bargaining.

The "no" vote statement should be revised similarly to the "yes" vote statement. In addition, the "no" vote statement should clarify that public employee unions are currently able to collect dues for unrelated political and ideological activities *as a condition of membership*, as this is the existing ability IP 62 seeks to change.

For such reason, petitioners request certification of the alternative "yes" and "no" vote statements set forth below:

> **Result of "Yes" Vote:** "Yes" vote prohibits public employee union from collecting dues from any member to fund political, ideological, or other non-collective bargaining activities, unless authorized by member.
>
> **Result of "No" Vote:** "No" vote retains existing ability of public employee unions to collect dues from members for political, ideological, other non-collective bargaining activities as condition of membership.

C. Summary

A ballot title must contain "[a] concise and impartial statement of not more than 125 words summarizing the state measure and its major effect." ORS 250.035.

The Attorney General's draft summary reads as follows:

> **Summary:** Currently, the Employment Relations Board may certify, or a public employer may recognize, a union as the "exclusive representative" of all employees in an appropriate bargaining unit of public employees. A union may use member dues for some costs unrelated to bargaining or representation. Payment nonmembers are required to make may be used only for costs related to bargaining or representation. Measure provides that Board cannot certify union as "exclusive representative" if it requires its members to make contributions that are spent on activities "not necessarily and reasonably incurred for the purpose of representation and collective bargaining." Measure permits union to separately collect itemized dues for activities unrelated to representation, collective bargaining only from its members who consent in writing to additional contributions. Other provisions.

Consistent with Petitioners' comments regarding the caption and results statement, the summary should be revised to reflect the fact that the major effect of IP 62

Nathan R. Rietmann
Attorney at Law
1270 Chemeketa St. NE
Salem, Oregon 97301
503-551-2740
nathan@rietmannlaw.com

is on member dues that are used for *political* and *ideological* activities unrelated to collective bargaining.

Petitioners also object to the draft summary's discussion of nonmembers. First, as presently drafted, the discussion of nonmembers suggests that nonmember's "fair share" payments are only used for representation and bargaining when, in fact, fair-share fees may be used for political, ideological, and other non-collective bargaining activities unless a nonmember takes affirmative action to notify the union that they wish to opt-out and receive a rebate or refund of that portion of fair-share fees expended for political, ideological and other non-collective bargaining activities. Secondly, the current discussion fails to inform voters that nonmembers, despite being required to make payments equivalent to those of members for bargaining related activities, do not have the right to vote on their employment contract or otherwise have the same rights as members to participate in and direct the collective bargaining activities of the union serving as their exclusive representative.

Petitioners also object to the summary's statement that: "A union may use member dues for *some* costs unrelated to bargaining or representation." (emphasis added). As used in the context of the summary, the term "some" implies there is a limit to the amount of member dues a union may use for purposes unrelated to collective bargaining or representation. The term, as used in context, also serves to quantify the amount of member dues that may be used for unrelated activities as a small amount.

In fact, a public employee union could use all of its dues and fair share fees for purposes unrelated to collective bargaining and the amount of member dues spent on unrelated activities is not small or minimal. For example, Petitioners' union (SEIU Local 503, OPEU), collected more than $29,000,000 in dues and "fair-share" payments in 2014 and intends to spend more than 20% of its member dues in 2016 on political, ideological, and other non-collective bargaining activities. *See,* Exhibit A; Exhibit C Page 2. This means that if SEIU Local 503, OPEU collects the same amount of dues in 2016 as it did in 2014, SEIU Local 503, OPEU is planning to spend at least $5,800,000 on political, ideological, and other non-collective bargaining activities in 2016. To put this number in perspective, SEIU Local 503, OPEU only spent $8,531,798 of its $29,000,000 budget on direct representation activities in 2014 *See*, Exhibit C Page 2.

Petitioners also object to the statement "Board cannot certify union....as exclusive representative" because the statement is underinclusive in that Section 8(4) of the measure also prohibits a public employer from recognizing a union that does not comply with ORS 243.622 as an exclusive representative.

In lieu of the Attorney General's draft summary, Petitioners request certification of the alternative summary set forth below:

Nathan R. Rietmann
Attorney at Law
1270 Chemeketa St. NE
Salem, Oregon 97301
503-551-2740
nathan@rietmannlaw.com

Summary: Currently, union may act as the "exclusive representative" of all employees in an appropriate bargaining unit of public employees and unions may use member dues for collective and non-collective bargaining activities. Nonunion members can opt-out of fees used for non-collective bargaining activities but cannot vote on their contract or participate in collective bargaining. Measure prohibits union from being "exclusive representative" if it requires members to make compelled contributions that are spent on "political or ideological activities or any expenditures that are not necessarily and reasonably incurred for the purpose of representation and collective bargaining." Measure permits union to separately collect itemized dues for activities unrelated to representation, collective bargaining only from individual members who consent in writing to additional contributions. Other provisions.

CONCLUSION

Petitioners appreciate the Attorney General's efforts in preparing the draft ballot title and hope their comments are helpful in finalizing the certified ballot title.

Nathan R. Rietmann
Attorney at Law
1270 Chemeketa St. NE
Salem, Oregon 97301
503-551-2740
nathan@rietmannlaw.com

MEMORANDUM

DATE: September 30, 2015

TO: Fair Share Payers Objecting to Use of Fees for Nonrepresentational Purposes

FROM: SEIU Local 503, OPEU

RE: **ADVANCE REDUCTION OF FAIR SHARE FEES**

Enclosed is a check for the advance reduction of the portion of your fair share fees, which are used for nonrepresentational purposes. This check is for October 1, 2015 thru March 31, 2016 (6 months).

Your check stub will reflect the following calculations:

1. Total fair share fees (Sept 2015 dues times 6 months)
2. Less $4.50 CAPE Political Committee Contribution ($.75 per month for 6 months)
3. Equals Net Non-CAPE fair share fees
4. Net fair share fees times 19.53%
5. Add $4.50 CAPE Political Committee Contribution from line 2
6. Equals total advance reduction check

The effect of this calculation is to provide to you an advance reduction equal to the CAPE Political Contribution plus 19.53% of your next six months dues, which were determined to be the portion of your dues used for nonrepresentational purposes.

PLEASE NOTE: You are on record as a continuous objector and do not need to send a letter to object each year. You will, however, continue to receive a packet each February advising you of your right to challenge the percentage of the advance reduction calculation.

If you have any questions, please contact the Accounting Department of SEIU Local 503, OPEU at (503) 581-1505 extension 158.

Enclosure
gjl

Excerpt CAPE Report

SEIU 503 Membership & CAPE Report May, 2015	Represented Workers	Members	Member Percentage	Member YTD Percent Change	CAPE	CAPE Membership Percentage	CAPE YTD Percent Change
Private Sector Homecare	661	552	83.5%	3.0%	39	7.1%	0.2%
State Adult Foster Care	1,857	362	19.5%	1.7%	174	48.1%	-0.4%
State Child Care	3,381	1,140	33.7%	-0.4%	368	32.3%	4.3%
State Homecare	28,824	18,107	62.8%	-1.1%	7,397	40.9%	-1.2%
Private Sector Nursing Homes	2,908	2,592	89.1%	-0.3%	370	14.3%	0.0%
Care Provider Division Totals	**37,631**	**22,753**	**60.5%**	**-0.2%**	**8,348**	**36.7%**	**-0.4%**
Local Government	3,151	2,651	84.1%	2.2%	304	11.5%	0.9%
Private Non-Profit	845	661	78.2%	6.7%	72	10.9%	1.4%
Higher Education	4,877	3,105	63.7%	6.1%	548	17.6%	0.2%
State	21,128	16,104	76.2%	5.4%	2,661	16.5%	0.2%
Public Division Totals	**30,001**	**22,521**	**75.1%**	**5.2%**	**3,585**	**15.9%**	**0.3%**
SEIU 503 Totals	**67,632**	**45,274**	**66.9%**	**2.3%**	**11,933**	**26.4%**	**0.0%**

IP 62 Exhibit B
Page 1 of 1

Return

FORM LM-2 LABOR ORGANIZATION ANNUAL REPORT

U.S. Department of Labor
Office of Labor-Management Standards
Washington, DC 20210

MUST BE USED BY LABOR ORGANIZATIONS WITH $250,000 OR MORE IN TOTAL ANNUAL RECEIPTS AND LABOR ORGANIZATIONS IN TRUSTEESHIP

Form Approved
Office of Management and Budget
No. 1245-0003
Expires: 08-31-2016

This report is mandatory under P.L. 86-257, as amended. Failure to comply may result in criminal prosecution, fines, or civil penalties as provided by 29 U.S.C. 439 or 440.

READ THE INSTRUCTIONS CAREFULLY BEFORE PREPARING THIS REPORT.

For Official Use Only	1. FILE NUMBER	2. PERIOD COVERED	3. (a) AMENDED - Is this an amended report:	
	519-355	From 10/01/2013 Through 09/30/2014	(b) HARDSHIP - Filed under the hardship procedures: (c) TERMINAL - This is a terminal report:	No No No

4. AFFILIATION OR ORGANIZATION NAME		8. MAILING ADDRESS (Type or print in capital letters)	
SERVICE EMPLOYEES		First Name MARTIN	Last Name CHILDS
5. DESIGNATION (Local, Lodge, etc.) LOCAL UNION	6. DESIGNATION NBR 503	P.O Box - Building and Room Number PO BOX 12159	
7. UNIT NAME (if any)		Number and Street 1730 COMMERCIAL STREET SE	
9. Are your organization's records kept at its mailing address? Yes		City SALEM	
		State OR	ZIP Code + 4 973091059

Each of the undersigned, duly authorized officers of the above labor organization, declares, under penalty of perjury and other applicable penalties of law, that all of the information submitted in this report (including information contained in any accompanying documents) has been examined by the signatory and is, to the best of the undersigned individual's knowledge and belief, true, correct and complete (See Section V on penalties in the Instructions.)

70. SIGNED: Rob J Sisk PRESIDENT 71. SIGNED: Rebecca s Sandoval TREASURER
Date: Dec 31, 2014 Telephone Number: 503-580-8893 Date: Dec 31, 2014 Telephone Number: 541-690-4142

Form LM-2 (Revised 2010)

ITEMS 10 THROUGH 21

FILE NUMBER: 519-355

10. During the reporting period did the labor organization create or participate in the administration of e trust or a fund or organization, as defined in the instructions, which provides benefits for members or beneficiaries? Yes

11(a). During the reporting period did the labor organization have a political action committee (PAC) fund? Yes

11(b). During the reporting period did the labor organization have a subsidiary organization as defined in Section X of these Instructions? No

12. During the reporting period did the labor organization have an audit or review of its books and records by an outside accountant or by a parent body auditor/representative? Yes

13. During the reporting period did the labor organization discover any loss or shortage of funds or other assets? (Answer "Yes" even if there has been repayment or recovery.) No

14. What is the maximum amount recoverable under the labor organization's fidelity bond for a loss caused by any officer, employee or agent of the labor organization who handled union funds? $1,000,000

15. During the reporting period did the labor organization acquire or dispose of any assets in a manner other than purchase or sale? No

16. Were any of the labor organization's assets pledged as

20. How many members did the labor organization have at the end of the reporting period? 52,327

21. What are the labor organization's rates of dues and fees?

Rates of Dues and Fees					
Dues/Fees	Amount		Unit	Minimum	Maximum
(a) Regular Dues/Fees	1.7% + $2.75	per	base pay per month	n/a	n/a
(b) Working Dues/Fees		per			
(c) Initiation Fees		per			
(d) Transfer Fees		per			
(e) Work Permits		per			

security or encumbered in any way at the end of the reporting period?	No
17. Did the labor organization have any contingent liabilities at the end of the reporting period?	No
18. During the reporting period did the labor organization have any changes in its constitution or bylaws, other than rates of dues and fees, or in practices/procedures listed in the instructions?	No
19. What is the date of the labor organization's next regular election of officers?	11/2014

Form LM-2 (Revised 2010)

STATEMENT A - ASSETS AND LIABILITIES FILE NUMBER: 519-355

ASSETS

ASSETS	Schedule Number	Start of Reporting Period (A)	End of Reporting Period (B)
22. Cash		-$245,768	$248,148
23. Accounts Receivable	1	$2,334,377	$2,513,374
24. Loans Receivable	2	$0	$0
25. U.S. Treasury Securities		$0	$0
26. Investments	5	$9,001,764	$9,112,022
27. Fixed Assets	6	$3,547,273	$3,303,506
28. Other Assets	7	$875,895	$840,404
29. TOTAL ASSETS		$15,513,541	$16,017,454

LIABILITIES

LIABILITIES	Schedule Number	Start of Reporting Period (A)	End of Reporting Period (B)
30. Accounts Payable	8	$42,186	$195,463
31. Loans Payable	9	$0	$0
32. Mortgages Payable		$0	$0
33. Other Liabilities	10	$3,034,314	$2,872,226
34. TOTAL LIABILITIES		$3,076,500	$3,067,689

35. NET ASSETS	$12,437,041	$12,949,765

Form LM-2 (Revised 2010)

STATEMENT B - RECEIPTS AND DISBURSEMENTS FILE NUMBER: 519-355

CASH RECEIPTS	SCH	AMOUNT	CASH DISBURSEMENTS	SCH	AMOUNT
36. Dues and Agency Fees		$25,880,395	50. Representational Activities	15	$8,531,798
37. Per Capita Tax		$1,328,565	51. Political Activities and Lobbying	16	$1,547,870
38. Fees, Fines, Assessments, Work Permits		$0	52. Contributions, Gifts, and Grants	17	$53,109
39. Sale of Supplies		$0	53. General Overhead	18	$5,794,399
40. Interest		$366,813	54. Union Administration	19	$1,063,702
41. Dividends		$225,275	55. Benefits	20	$3,354,246
42. Rents		$0	56. Per Capita Tax		$6,897,942
43. Sale of Investments and Fixed Assets	3	$159,948	57. Strike Benefits		$0
44. Loans Obtained	9	$0	58. Fees, Fines, Assessments, etc.		$0
45. Repayments of Loans Made	2	$0	59. Supplies for Resale		$0
46. On Behalf of Affiliates for Transmittal to Them		$192,186	60. Purchase of Investments and Fixed Assets	4	$154,941
47. From Members for Disbursement on Their Behalf		$816,369	61. Loans Made	2	$0
48. Other Receipts	14	$588,229	62. Repayment of Loans Obtained	9	$0
49. TOTAL RECEIPTS		$29,557,780	63. To Affiliates of Funds Collected on Their Behalf		$192,186
			64. On Behalf of Individual Members		$816,369
			65. Direct Taxes		$657,302

66. Subtotal			$29,063,864
67. Withholding Taxes and Payroll Deductions			
67a. Total Withheld	$3,278,045		
67b. Less Total Disbursed	$3,278,045		
67c. Total Withheld But Not Disbursed			
68. TOTAL DISBURSEMENTS			$29,063,864

Form LM-2 (Revised 2010)

SCHEDULE 1 - ACCOUNTS RECEIVABLE AGING SCHEDULE FILE NUMBER: 519-355

Entity or Individual Name (A)	Total Account Receivable (B)	90-180 Days Past Due (C)	180+ Days Past Due (D)	Liquidated Account Receivable (E)
SEIU LOCAL 503 CENTRAL LEDGER A/R	$63,647		$4,900	$900
SEIU LOCAL 503 DUES A/R-MEMBERS	$2,303,850			
SEIU GRANT SUPPORT	$64,235			
ACCRUED INTEREST & MISC A/R	$81,642			
Total of all itemized accounts receivable	$2,513,374	$0	$4,900	$900
Totals from all other accounts receivable				
Totals(Total of Column (B) will be automatically entered in Item 23, Column(B))	$2,513,374	$0	$4,900	$900

Form LM-2 (Revised 2010)

SCHEDULE 2 - LOANS RECEIVABLE FILE NUMBER: 519-355

List below loans to officers, employees, or members which at any time during the reporting period exceeded $250 and list all loans to business enterprises regarless of amount. (A)	Loans Outstanding at Start of Period (B)	Loans Made During Period (C)	Repayments Received During Period		Loans Outstanding at End of Period (E)
			Cash (D)(1)	Other Than Cash (D)(2)	
Total of loans not listed above	$0	$0	$0	$0	$0
Total of all lines above	$0	$0	$0	$0	$0
Totals will be automatically entered in...	Item 24 Column (A)	Item 61	Item 45	Item 69 with Explanation	Item 24 Column (B)

Form LM-2 (Revised 2010)

SCHEDULE 3 - SALE OF INVESTMENTS AND FIXED ASSETS FILE NUMBER: 519-355

Description (if land or buildings give location) (A)	Cost (B)	Book Value (C)	Gross Sales Price (D)	Amount Received (E)
SALES OF MARKETABLE SECURITIES	$4,756,714	$4,981,989	$4,981,989	$4,981,989
Total of all lines above	$4,756,714	$4,981,989	$4,981,989	$4,981,989
			Less Reinvestments	$4,822,041
(The total from Net Sales Line will be automatically entered in Item 43)			Net Sales	$159,948

Form LM-2 (Revised 2010)

SCHEDULE 4 - PURCHASE OF INVESTMENTS AND FIXED ASSETS FILE NUMBER: 519-355

Description (if land or buildings, give location) (A)	Cost (B)	Book Value (C)	Cash Paid (D)
MARKETABLE SECURITIES	$4,591,500	$4,591,500	$4,591,500
FIXED ASSETS	$154,941	$154,941	$154,941
Total of all lines above	$4,746,441	$4,746,441	$4,746,441
		Less Reinvestments	$4,591,500
(The total from Net Purchases Line will be automatically entered in Item 60.)		Net Purchases	$154,941

Form LM-2 (Revised 2010)

SCHEDULE 5 - INVESTMENTS FILE NUMBER: 519-355

Description (A)	Amount (B)
Merketable Securities	
A. Total Cost	$9,163,256
B. Total Book Value	$9,112,022
C. List each marketable security which has a book value over $5,000 and exceeds 5% of Line B.	

STOLL BERNE

STOLL STOLL BERNE LOKTING & SHLACHTER P.C. LAWYERS

Steven C. Berman
sberman@stollberne.com

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SECRETARY OF STATE

November 13, 2015

VIA EMAIL

Jeanne Atkins
Secretary of State
Elections Division
255 Capital Street NE, Suite 501
Salem, OR 97310

Re: Initiative Petition No. 62 for the General Election of November 8, 2016: Comments Regarding Non-Compliance With Procedural Requirements of the Oregon Constitution

Dear Secretary Atkins:

I represent Ben Unger regarding the ballot title for Initiative Petition No. 62 for the General Election of November 8, 2016 (the "Initiative"). Mr. Unger is an elector in the State of Oregon and the Executive Director of Our Oregon. This letter is written in response to your office's October 29, 2015 public notice, which invites comments on whether the Initiative complies with the procedural requirements of the Oregon Constitution. For the reasons set forth below, it does not. Mr. Unger respectfully requests that your office take no further action regarding the Initiative, other than to declare that it fails to comply with the procedural requirements of the Oregon Constitution.

The Initiative does not comply with the procedural requirements of the Oregon constitution, because it is both statutory and constitutional. The Oregon constitution reserves the initiative power to the voters, which includes the power "to propose laws and amendments to the Constitution * * *." Or Const, Art. IV, §1(2)(a). An initiative must be either a law or a constitutional amendment, but it cannot be both. Article IV, section 1(2)(b) sets forth the requirements for an "initiative law." Article IV, section 1(2)(c) sets forth the requirements for "[a]n initiative amendment to the Constitution."

It is well-settled that the authority of the legislature to adopt laws and the electors' authority to enact laws via the initiative are identical. As the Supreme Court explained in *Hazell v. Brown*, 352 Or 455, 465 (2012):

> "We have recognized that the legislative power is a unitary authority that rests with two lawmaking bodies, the legislature and the people. The exercise of that power is always coequal and co-ordinate, regardless of which of the two entities wields it."

209 SW OAK STREET, SUITE 500 PORTLAND, OR 97204 TEL (503) 227-1600 FAX (503) 227-6840

(Citations omitted; internal quotation marks omitted). The legislature has, and retains, authority to legislate the same laws and issues that the voters address through their exercise of the initiative authority granted by Article IV, section 1(2)(b). *See, e.g., MacPherson v. Department of Administrative Services*, 340 Or 117, 126 (2006) ("[i]n Oregon, the Legislative Assembly and the people, acting through the initiative or referendum processes, share in exercising legislative power"). As a result, the voters cannot pass a law, and then prevent the legislature from changing that law. If the voters want to prevent the legislature from passing laws on certain topics or areas, then the voters must amend or revise the Constitution to do so.

Section 8(1) of the Initiative seeks to shift that balance of power through an initiative law, not a constitutional amendment. Specifically, Section 8(1) provides that certain terms in the Initiative "shall have the meanings provided in ORS 243.650 (2015)." Section 8(1) further provides that those definitions cannot be amended unless submitted to a statewide initiative or referral. In other words, Section 8(1) provides that the legislature cannot amend certain statutory terms through the legislative process; only the voters can approve certain statutory amendments. That, however, is inconsistent with the extant constitutional structure.

The Initiative exceeds the procedural bounds for a *statutory* initiative. Section 8(1) of the Initiative seeks to alter the balance of power set forth in the Oregon Constitution between the legislature and the voters exercising their initiative rights. That can only be accomplished through a proposed *constitutional* amendment, not a proposed law. However, the Initiative has been filed as a proposed statutory enactment, not as a constitutional amendment. The Chief Petitioners of the Initiative have failed to meet a basic procedural requirement; they have misidentified as a statutory initiative what must be, at least in part, a constitutional initiative. For that reason, the Initiative does not comply with the procedural requirements of the Oregon Constitution and cannot appear on the ballot.

Thank you for your consideration of these comments.

SCB:jjs
cc: client

STOLL BERNE

STOLL STOLL BERNE LOKTING & SHLACHTER P.C. LAWYERS

Steven C. Berman
sberman@stollberne.com

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SECRETARY OF STATE

November 13, 2015

VIA EMAIL

Jeanne Atkins
Secretary of State
Elections Division
255 Capital Street NE, Suite 501
Salem, OR 97310

Re: Initiative Petition No. 62 for the General Election of November 8, 2016

Dear Secretary Atkins:

I represent Heather Conroy regarding the ballot title for Initiative Petition No. 62 for the General Election of November 8, 2016 (the "Initiative"). Ms. Conroy is an elector in the State of Oregon and the Executive Director of Service Employees International Union Local 503. This letter is written in response to your office's public notice, dated October 29, 2015, which invites comments on the draft ballot title for the Initiative.

Ms. Conroy respectfully submits that the caption, results statements and summary for the draft ballot title do not meet the requirements of ORS 250.035(2). Of most substantial concern is that the Initiative will allow public employees to receive the benefits of collective bargaining and union representation without sharing in the costs of bargaining and representation. In other words, the Initiative creates a "free-rider" situation. However, the caption, results statements and summary fail to mention the free-rider issue.

The Oregon Supreme Court, repeatedly and consistently, has held that when a proposed initiative would amend the Oregon Public Employee Collective Bargaining Act, ORS 243.650, *et seq.*, (the "PECBA") to allow for free riders, that is a predominant effect and result that *must* be addressed in the caption, results statements and summary. *See, e.g., Towers v. Rosenblum* 354 Or 125 (2013); *Sizemore v. Myers*, 342 Or 578 (2007); *Novick v. Myers*, 333 Or 18 (2001); *Dale v. Kulongoski*, 321 Or 108 (1995). Because the Initiative will create free riders – by allowing public employees to refuse to pay for representation and collective bargaining while still requiring public employee unions to provide those employees with representation and collective bargaining services – the free-rider concept is a major effect of the Initiative that must be addressed throughout the ballot title. As is discussed in more detail below, the ballot title also fails to inform voters about other aspects of the Initiative including that the Initiative creates a new private right of action, with a sweeping standing provision. Ms. Conroy requests that Attorney General certify a ballot title that corrects those deficiencies so that the ballot title substantially complies with the statutory requirements.

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I. An Overview of Applicable Law

Two aspects of current law are relevant to the free-rider issue presented by the Initiative. First, the PECBA provides for fair share agreements (or payments-in-lieu-of-dues) for public employees who choose not to become union members. As the Oregon Supreme Court explained in *Novick*:

> "Under current law, unions and employers may negotiate union security agreements that, in one form or another, require bargaining unit employees who are not union members to pay for the cost of union representation."

333 Or at 26 (citation omitted). Without those payments, "public employees who do not join a union [would] become 'free riders,' by securing bargaining and representation services without cost." *Dale*, 321 Or at 111-112 (footnote omitted). "In practical terms, a prohibition on such agreements enables those employees to receive union representation without cost and represents a significant change in Oregon law." *Novick* 333 Or at 26 (citation omitted). That significant change must be addressed in the ballot title. *Id. See also Sizemore*, 342 Or at 588-589 (reaching same conclusion); *Towers*, 354 Or at 130-131 (same). As is set forth below, the Initiative allows for free riders.

The second aspect of current law relevant here is that it is an unfair labor practice for a public employer to treat union-member and non-union member public employees in the same bargaining unit differently. In other words, it is a violation of law for two public employees with the same job to receive different terms, conditions or benefits of employment because one belongs to a union and one does not. ORS 243.672(1)(a)-(c); ORS 243.672(2)(a). *See, e.g., Oregon Nurses Association v. Oregon Health & Science University*, 19 PECBR 590, 602 (2002) (Employment Relations Board finding public employer committed unfair labor practice by offering union and non-union members different terms of compensation). The Initiative does *not* change any of those provisions of law.

Because the Initiative allows public employees in a union represented bargaining unit to refuse to pay dues or make payments-in-lieu-of-dues, but does not amend the law that requires union members and non-union members be treated similarly by public employers, the impact of the Initiative would be to allow employees to receive, for free, representation services in employment disputes and the benefit from the collective bargaining agreements entered into between their public employer and a public employee union. That presents the same free-rider scenario – as to wages, benefits and conditions of employment and representation obligations – the Court has addressed again and again. The case law is unambiguous. That free-rider issue must be discussed, front and center, in the caption, results statements and summary.

II. An Overview of Initiative Petition No. 62

The Initiative amends the PECBA.

The Initiative first provides that employees in a represented bargaining unit may choose not to make payments to a public employee labor union that support the union's political and

ideological causes. Initiative, § 2, § 3(2)(a), § 5(1). That is, of course, already a long-standing option available to public employees. *See, e.g., Abood v. Detroit Board of Education*, 431 US 209 (1977) (discussing non-union member's ability to refuse to make payments to union for political or ideological causes). In that regard, the Initiative does not alter existing law, and accordingly, the Initiative's provisions allowing public employees to choose whether to make "political or ideological" payments should not be addressed in the ballot title. *See, e.g., Lavey v. Kroger*, 350 Or 559, 563 (2011) (ballot title must identify "actual major effect" of an initiative, which is "the changes that the proposed measure would enact in the context of existing law").

What is unique about the Initiative is that is provides that employees in a represented bargaining unit can refuse to pay anything, but still receive the full benefits of union representation. The Initiative accomplishes this change to allow for free-riders by first revising the requirements for membership in a public employee union. Section 3(2)(b) of the Initiative amends ORS 243.662 to provide that every public employee within an appropriate bargaining unit has the "right to join and participate *as a member* in all activities" of a public employee union "that are necessarily or reasonably incurred for the purpose of representation and collective bargaining with their employer" without having to make any payments "that may be used" by the public employee union " to financially support, or subsidize, any political or ideological activity or expenditure that is not necessarily or reasonably incurred for the purpose of representation and collective bargaining * * *." (Emphasis added). Section 5 prohibits any public employee union from "compel[ling] any public employee to pay member dues or other money as a condition of joining and participating *as a member* in the representation and collective bargaining activities of the labor union" if any portion of those payments or dues are used by the union "to pay for, or subsidize, political or ideological activities * * * that are not necessarily or reasonably incurred for the purpose of representation and collective bargaining" with the employee's public employer. Initiative, § 5 (emphasis added). *See also* Initiative, § 6 (requiring union to obtain employee consent to collect funds other than those for costs of representation). In other words, under the Initiative, public employee union membership appears to be contingent only on a public employee's paying dues sufficient to cover the union's costs for the employee's representation and collective bargaining. Under the Initiative, to be a union member, all one needs to do is make the equivalent of a fair-share payment.

The Initiative then allows any "member" to cancel his or her membership at any time. Specifically, the amendments made to ORS 243.662 by Section 3(2)(c) of the Initiative provide each employee within an appropriate bargaining with:

> "The right to cancel membership in a labor organization recognized as an exclusive representative, and discontinue paying all member dues or other money required as a condition of membership, at any time."

When section 3(2)(c) is read in conjunction with section 3(2)(b) and section 5, the free-rider effect the Initiative creates is readily apparent. Under the Initiative, to become a union member, all one must do is pay for representation and collective bargaining services. One can stop being a union member at any time. However, nothing in the Initiative amends a public employer's obligation to treat union and non-union members the same or the union's duty of fair representation.

As a result, the Initiative creates a free-rider issue. The predominant effect of the Initiative is similar to the predominant effect of the initiatives at issue in *Towers*, *Sizemore*, *Novick* and *Dale*. A public employer will have to provide all similarly situated public employees with the same terms, conditions and benefits of employment and the union will have to represent the employee in grievance proceedings. The public employer will not be able to offer a non-dues paying public employee terms, conditions or benefits of employment that are less beneficial than those negotiated for paying, union-member public employees in the same bargaining unit. This means that if the Initiative passes, a non-dues paying public employee (or a non-member) will receive the benefits of a union-negotiated collective bargaining agreement and representation services without having paid for the costs for negotiating that agreement or representation services.

The Initiative makes two additional changes to Oregon law pertinent here. First, the Initiative creates a unique private right of action. Section 7 provides "[e]very public employee within an appropriate bargaining unit represented by" a public employee union with the right "to commence a civil action in any circuit court of this state where the [public employee union] has members to enforce the rights recognized by this 2016 Act." That standing provision is quite uncommon, in that harm to the public employee is, apparently, not required. The Initiative is silent as to who would be the defendant in any such civil action. The remedies in any such action include injunctive and equitable relief, actual damages and mandatory prevailing plaintiff attorney fees and costs. *Id.* Section 7 apparently would divest the Employment Relations Board of its exclusive jurisdiction to determine what constitutes an unfair labor practice under the PECBA. *See* ORS 243.677 (so providing).

The Initiative also seeks to alter the balance of power set forth in the Oregon constitution between the legislature and the voters exercising their initiative rights. It is well-settled that the authority of the legislature to adopt laws and the electors' authority to enact laws via the initiative are identical. As the Supreme Court explained in *Hazell v. Brown*, 352 Or 455, 465 (2012):

> "We have recognized that the legislative power is a unitary authority that rests with two lawmaking bodies, the legislature and the people. The exercise of that power is always coequal and co-ordinate, regardless of which of the two entities wields it."

(Citations omitted; internal quotation marks omitted).

Section 8(1) of the Initiative seeks to shift that balance of power. Specifically, Section 8(1) provides that certain terms in the Initiative "shall have the meanings provided in ORS 243.650 (2015)." Section 8(1) further provides that those definitions cannot be amended unless submitted to a statewide initiative or referral. In other words, under Section 8(1), the legislature cannot amend certain statutory terms, only the voters can approve certain statutory amendments. That, of course, is inconsistent with the current constitutional structure.

Finally, the Initiative contains a confusing, contradictory and ultimately indiscernible definition of "necessarily and reasonably incurred for the purpose of representation and collective bargaining." Section 8(2) provides that phrase "is a term of legal art intended to refer, *depending on context*, to activities and expenditures that *either are or are not* germane to collective bargaining." (Emphasis added). In other words, under the Initiative, "necessarily and reasonably incurred for the purpose of representation and collective bargaining" sometimes refers to activities and expenditures that "are germane to collective bargaining" and sometimes refers to activities and expenditures that "are not germane to collective bargaining." It is difficult to discern why that phrase, which appears in a handful of substantive provisions in the Initiative, is defined to have two different, and completely opposite, meanings. What is apparent from the text of the Initiative is that the term is not well-defined, and its meaning is, at best, ambiguous.

III. The Draft Ballot Title

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*, 350 Or at 563 (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 "actual major effect" is the change or changes "the proposed measure would enact in the context of existing law." *Rasmussen v. Kroger*, 350 Or 281, 285 (2011). "The caption is the cornerstone for the other portions of the ballot title." *Greene v. Kulongoski*, 322 Or 169, 175 (1995). As the "headline," the caption "provides the context for the reader's consideration of the other information in the ballot title." *Greene*, 322 Or at 175.

The caption for the draft ballot title provides:

Public employee union cannot collect dues for uses other than representation, bargaining without member authorization.

Ms. Conroy respectfully submits that the caption does not accurately describe the subject matter of the Initiative. First, the caption completely fails to explain to voters and potential petition signers that the Initiative would allow non-union member public employees to receive the benefits of union representation without paying costs. As was set forth above, a public employer cannot provide different wages, benefits and conditions of employment to union and non-union member public employees in the same bargaining unit and the union cannot decline to provide representation services to a non-union member. Accordingly, under the Initiative, a non-union member public employee within a bargaining unit would be entitled to the same wages and benefits as those provided to union members in a negotiated collective bargaining agreement. This is the same "something for nothing" scenario presented by the ballot titles at issue in *Towers*, *Sizemore*, *Novick*, and *Dale*.

As unequivocally stated in *Towers*, the ballot title for anti-worker initiatives that allow for non-union public employees to act as free riders "is controlled by prior decisions of this court." 354 Or at 130. The ballot title for the Initiative must address the free-rider issue, just as the Court held that the ballot titles at issue in *Towers* and the cases that preceded *Towers* were deficient for failing to adequately address the free-rider issue.

In this regard, the certified (and Court affirmed) ballot titles for Initiative Petitions 35 and 36 in this election cycle provide useful guidance. IP 35 (2016) and IP 36 (2016) both allowed for represented employees to refuse to make payments-in-lieu-of-dues. However, neither of those initiatives altered a union or public employer's obligation to treat union and non-union members similarly. The draft ballot titles for those initiatives did not address the free-rider problem those initiatives created. Ms. Conroy, and others, commented on the draft ballot titles, and brought the free-rider issue to the Attorney General's attention. Those comments were well-taken by the Attorney General. For example, in response to those comments regarding the ballot title for IP 36 (2016), she wrote:

> "After considering relevant statutes and authorities pertaining to PECBA, we agree with Ms. Vaandering, Ms. Darby, Ms. Conroy, and Mr. Schwarz, that IP 36 would create a free-rider effect. The Oregon Supreme Court has repeatedly concluded that such an effect must be included in the caption. *See, e.g., Novick/Bosak,* 333 Or at 26, 36 P3d 464 (2001); *Sizemore/Terhune,* 342 Or at 588-89; *Towers,* 354 Or at 131. Although other existing statutory provisions may contribute to a free-rider effect that would occur if IP 36 were approved by voters, the most immediate cause of that effect is ORS 243.672(1)(a). That statute, not amended by IP 36, provides that '[i]t is an unfair labor practice for a public employer or its designated representative to do any of the following: (a) Interfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662.' If IP 36 were approved, ORS 243.672(1)(a) would require a public employer to provide, upon demand by a non-union public employee, employment terms at least as favorable as those offered under the collective bargaining agreement. If a public employer were to refuse to allow that non-union public employee terms at least as favorable as the union-bargained terms, the 'natural and probable effect' of that refusal is that the public employer would violate ORS 243.672(1)(a) by interfering with or coercing that employee with respect to the protected decision whether to join a union. *See Oregon Nurses Association v. Oregon Health & Science University,* 19 PECBR 590, 602 (2002) (a public employer violates ORS 243.672(1)(a) when 'the natural and probable effect of the employer's action would be to interfere with, restrain, or coerce employees in the exercise of their protected rights'). * * * Because PECBA would legally entitle a non-union public employee to obtain at least union-negotiated employment terms, and because IP 36 prohibits a public employer and public employee union from requiring that non-union public employee to share in the unions representation costs, there is a free-rider effect in IP 36."

June 17, 2015 Letter from Matthew J. Lysne, Senior Assistant Attorney General to Jim Williams, Director, Elections Division, Oregon Secretary of State at 3-4 (discussing certified ballot title for IP 36).

The proponents of Initiative Petitions 35 and 36 sought judicial review of the certified ballot titles for Initiative Petitions 35 and 36. Their predominant argument was that the Attorney General had erred by addressing the free-rider issue in the certified ballot titles. The Court rejected those arguments without opinion, and affirmed the certified ballot titles without modification. The Court ruled that the certified ballot titles were correct for addressing the free-rider issues raised by IPs 35 and 36.

The Court's extremely well-settled precedent, and the Attorney General's own thorough and well-reasoned analysis regarding similar initiatives *in this same election cycle*, provide determinative guidance here. The caption (and all provisions of the ballot title) must address the free-rider problem created by the Initiative. The caption is flawed for its failure to do so.

The phrase "[p]ublic employee unions cannot collect dues for uses other than representation, bargaining" is inaccurate. As was set forth above, the Initiative seeks to limit dues that may be collected to those "necessarily and reasonably incurred for the purpose of representation and collective bargaining," but then inconsistently (and contradictorily) defines that term. Accordingly, while the Initiative may modify a union's ability to collect dues for certain purposes, the full reach of those changes is unclear, and ultimately would be resolved by the Employment Relations Board or the courts. The caption ignores the practical effect of the Initiative, which is significantly more ambiguous than the language used in the caption. *See, e.g., Caruthers v. Myers*, 344 Or 596, 600 (2008) (Attorney General "may have to go beyond the words of a measure in order to give the voters accurate and neutral information about a proposed measure").

Finally, the caption is insufficient, because it fails to inform voters that the Initiative provides for a new, private right of action with a unique standing provision and mandatory prevailing plaintiff attorneys' fees. The Court has held, repeatedly, that a remedial provision in an initiative that authorizes litigation is a "subject matter" that the caption (and other sections of the ballot title) must address. *See, e.g., Sizemore*, 342 Or at 587-588 (so holding regarding initiative that restricted dues unions could collect and provided for private cause of action as remedy); *Greenberg v. Myers*, 340 Or 65, 72 (2006) ("[b]y failing to give any hint of the new remedial scheme in the caption, the Attorney General has understated the scope of the legal changes the proposed measure would enact") (citation omitted; internal quotation marks and ellipses omitted). Consistent with the Court's rulings, the Attorney General routinely includes enforcement provisions within the caption of a ballot title. She has adhered to that practice this election cycle as well. *See, e.g.*, Certified Ballot Title for Initiative Petition No. 40 (2016) (discussing litigation enforcement provision in all sections of ballot title); July 23, 2015 letter from Assistant Attorney General Shannon T. Reel to Jim Williams, Director, Elections Division, Oregon Secretary of State at 3 (letter accompanying certified ballot title for IP 40 (2016), explaining changes to draft ballot title, providing: "we agree that the caption should inform voters that the initiative authorizes lawsuits")." Section 8 is the sole enforcement provision in the Initiative. It creates a private right of action and allows for damages and prevailing plaintiff

attorneys' fees. Section 7 also alters the careful balance created by the PECBA, where the Employment Relations Board has sole authority to enforce the PECBA. It is a major effect, and part of the subject matter of the Initiative. Accordingly, voters must be informed that the Initiative "authorizes lawsuits."

For the reasons set forth above, the caption must be modified.

B. The Results Statements

ORS 250.035(2)(b) and (c) require that the 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 public employee union from collecting dues from any member to fund activities unrelated to representation or collective bargaining, unless authorized by member.
>
> "No" vote retains existing ability of public employee unions to collect dues from members for union purposes not directly related to representation or collective bargaining.

The results statements are flawed for the reasons set forth above.[1]

The result of no statement is flawed for the additional reason that it misstates current law. Current law provides that under a collective bargaining agreement, a non-member public employee may be required to share in representation costs that the union must provide to all bargaining unit members, not just representation costs for "non-members," as the result of no statement provides. Moreover, under current law no public employer can require an employee to pay dues unrelated to representation or collective bargaining; public employees always may choose not to make those payments. The result of no statement improperly implies that public employees must pay dues or make payments-in-lieu-of-dues that are unrelated to representation or collective bargaining. The result of no statement for IP 9 (2014) – after referral to the Attorney General for modification – and the result of no statements for IP 35 (2016) and IP 36 (2016) properly set forth current law, and Ms. Comoy respectfully submits that the Attorney General's decision to stray from those result of no statements is misplaced.

For the reasons set forth above, the results statements also must be revised.

[1]The result of yes statement should address the free-rider issue. It also should address, in more detail, the unique cause of action and remedy created by the Initiative. The certified ballot title for IP 40 (2016) used the phrase "authorizes lawsuits; attorney fees to prevailing plaintiffs." The same or similar language is appropriate here.

C. The Summary

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

- The summary quotes the phrase "necessarily and reasonably incurred for the purpose of representation and collective bargaining" from the text of the Initiative. As was set forth above, that phrase is curiously and inconsistently defined in the Initiative. It should not appear anywhere in the caption. In the very least, it must be signaled with a parenthetical "inconsistently defined" to clarify to voters the Initiative's bizarre and unique definition of that term. *Tauman v. Myers*, 343 Or 299, 302-304 (2007).

- As discussed above, the Initiative's impact on a union's ability to collect dues is unclear. The summary should so inform voters. *See, e.g., Wolf v. Myers*, 343 Or 494, 503 (2007) ("the Attorney General may state that the 'result' and the 'effect' of the measure is * * * unclear"). *See also* Initiative Petition No. 27 (2010), modified ballot title, after referral from the Oregon Supreme Court (summary providing: "[e]ffect on public sector unions' obligation to represent nonmembers is unclear").

- The caption should inform voters of the constitutional anomaly created by the Initiative. The Initiative was submitted as a statutory enactment, rather than as an amendment to the Constitution. However, as was discussed above, Section 8(1) of the Initiative also seeks to limit the authority of the legislature to change certain statutory definitions. That proposed constitutional change is a major effect of the Initiative. *See Christ v. Myers*, 339 Or 494, 500 (2005) ("[t]he statutory standards * * * all require a degree of interpretive effort by the Attorney General") (citations omitted); *id* at 500 ("the Attorney General must recognize that his or her statutory obligation includes a certain amount of basic interpretation"). It should be addressed in the summary.

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

SCB:jjs
cc: client

November 13, 2015

By e-Mail to Irrlistnotifier.sos@state.or.us

RECEIVED
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SECRETARY OF STATE

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

Re: Initiative Petition 62 (2016)
Draft Ballot Title Comments

Dear Secretary Atkins:

I write as an elector in response to your Notice of October 29, 2015 inviting comments on the proposed ballot title for Initiative Petition 62 (2016); and seeking any additional comment "on whether the petition complies with the procedural constitutional requirement established in the Oregon Constitution for initiative petitions."

Initiative Petition 62 (IP 62) seeks to amend the Public Employee Collective Bargaining Act (PECBA),[1] Oregon's four decades old labor relations law for the public sector adopted to balance public employer-public employee interests and harmoniously stabilize public sector labor relations in public employment.

IP 62 is one of seven[2] initiative petitions filed to date for the 2016 election. Each addresses public employee collective bargaining reflecting a variety of schemes to eliminate authority to negotiate any provision obligating contributions by non-members to the costs of collective bargaining negotiations and contract administration, but allowing them to receive the terms and conditions of the contract.

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[1] ORS 243.650 *et seq*

[2] IP 32 (2016), "The Independent Public Protection Act."
IP 33 (2016), "Public Employee Choice Act."
IP 35 (2016), Public Employee Choice Act." Certified Title: "Only union public employees may benefit from union bargaining without sharing representation costs; modifies representation obligations."
IP 36 (2016), "Independent Public Employee Choice Act. Certified Title: "Only union public employees may benefit from union bargaining without sharing representation costs; modifies representation obligations." Confirmed by Oregon Supreme Court.
IP 61(2016), "No Politics from My Pay Without My Say." Prospective petition pending submission of minimum sponsorship signatures.
IP 69 (2016), "The Public Employee Choice Act." Prospective petition pending submission of minimum sponsorship signatures.

At the outset, I believe the Attorney General should not certify IP 62 for submission to the ballot for at least two reasons:

1. IP 62 intrudes and regulates the internal affairs of unincorporated associations (labor organizations). The governance and internal affairs of labor organizations, including membership, is well-recognized as a contract between the members and their organization. IP 62 commands that labor organizations alter this relationship to conform to the manner it describes. The Oregon Constitution forbids such intrusion and impairment of contracts.

2. IP 62 is submitted as a statutory proposal. It includes, however, a provision restricting the constitutional authority and power of the legislature to undertake and changes to certain provisions defined in the proposed measure. It includes an explicit requirement that any changes to a specific list of statutory terms require a statewide, public vote of the People, forbidding the Legislature from exercising its lawful constitutional authority to make, change and repeal laws. Limitations on Legislative powers cannot be made by statute.

Following is a more detailed examination of IP 62, the issues it addresses and underlying support for rejecting IP 62, or should it not be rejected, problems with the draft ballot title.

I. Background

A. Public Employee Collective Bargaining

The Pubic Employee Collective Bargaining Act (PECBA) was enacted in 1973. The Oregon Legislature has adopted, as it may for any statute, adjustments and changes to the law over its life.[3] Its core provision has remained in intact from the beginning. It establishes the right of public employees to designate union representation. 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.[4]

The law is administered by the Employment Relations Board (ERB). Its responsibilities and duties, as defined in ORS 243.766, generally are to investigate and resolve disputes over appropriate bargaining units, conduct representation elections; conduct proceedings on unfair labor practice complaints and take actions necessary for enforcement of its orders; conduct hearing and make inquiries necessary to carry out its duties and powers. 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. Acts by a public employer that intrude on this right are categorized as unfair labor

[3] See, e.g., SB 750 (1995); HB 3342 (2013).
[4] ORS 243.662 "Rights of public employees to join labor organizations."

practices under ORS 243.672(1); and those by a labor organization are identified under ORS 243.672(2). Complaints of such acts are processed and orders may be issued by the ERB, which in turn may be appealed to the Oregon Court of Appeals.

The PECBA does not regulate the internal business, organizational affairs or membership of unions. The ERB in determining status as a labor organization, only examines whether the statutory definition under ORS 243.650 (13) of "labor organization" is met. It makes no inquiry or determination regarding the internal business, organizational affairs or membership in the organization

For employees desiring to exercise their statutory right, a first step generally is securing a definition and designation of an "appropriate bargaining unit." A bargaining unit is a grouping of employees by broadly common employment characteristics. These common characteristics are typically known as "community of interest." Community of interest is generally reflected by commonality of wages, hours, and terms and conditions such as education required for the work, and supervision. A labor organization that claims to represent a majority of employees (because they have individually designated it as their representative for purposes of collective bargaining) in an appropriate unit may request their public employer to voluntarily recognize and bargaining with the labor organization. Where there is not voluntary recognition because that representation is doubted or because, for example, the appropriate unit is not agreed, it is the responsibility of the ERB to determine the appropriate unit and supervise a secret ballot election.

Once majority representation is voluntarily recognized or certified by ERB a result of election or majority card check, the labor organization is designated the "exclusive representative"[5] of that unit of employees. IP 62 makes

The cornerstone right guaranteed in ORS 243.662 carries no requirement or obligation for any public employee to exercise such right. Exercise of the rights guaranteed under ORS 243.662 is not premised on membership status within the union seeking to represent an appropriate unit of employees. 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 is there any obligation to become or remain a member to form a labor organization. There is no test of member/non-member status or commitment at any time in the representation process.

An exclusive representative, however, is required to represent all employees in the appropriate unit. Any collective bargaining agreement it negotiates must cover all such

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[5] ORS 243.650 Definitions for ORS 243.650 to 243.782. "As used in ORS 243.650 to 243.782, unless the context requires otherwise:

***

"(8) "Exclusive representative" means the labor organization that, as a result of certification by the board or recognition by the employer, has the right to be the collective bargaining agent of all employees in an appropriate bargaining unit."

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.[6]

Similarly, the public employer of the employees in an appropriate unit must bargain in good faith, and it may not treat employees differently because of whether or not they exercise their right.

B. Costs of Collective Bargaining and Contract Administration

An issue that is frequently the subject of Initiative Petitions, several dozen over the last 20 years, has been the negotiated provisions requiring represented non-members to pay a "fair share" fee based on that portion of member dues that are attributable only to collective bargaining negotiations and contract administration. Public discussion and debate, and reports of them, usually conflates or confuses "representation" with "membership;" and "dues" with "fees," often using them interchangeably; and mistaking and substituting terms such as "union shop" for "agency fee" or "fair share." Likewise, such discussions often, and mistakenly, assert that fees require support of union expenditures beyond collective bargaining and contract administration, and especially political and ideological activities and expenditures. For example, "union shop,"[7] 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).

Each of these terms has a separate and distinct meaning. Representation is described above. Dues are the obligation of a member to become and maintain their membership, along with rights and privileges of membership in their organization. Membership in the labor organization is an individual, voluntary choice of employees in forming a labor organization of their choice and in choosing to "join and participate."

Generically known as agency fee, "fair share" is a provision authorized by ORS 243.650(10).[8] Fair share 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 may 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.[9] In addition,

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[6] ORS 243.672(2)(a).
[7] The common term for "all union agreement."
[8] "'Fair-share agreement'" means an agreement between the public employer and the recognized or certified bargaining representative of public employees whereby employees who are not members of the employee organization are required to make an in-lieu-of-dues payment to an employee organization except as provided in ORS 243.666."
[9] ORS 243.650(10); OAR 115-030-0000

the authorization in ORS 243.666(1)[10] safeguards the rights of those with religious objection to payments of any kind to a labor organization.

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 has consistently approved of collection of fair share fees to support the obligation of an exclusive representative to bargain for and represent all employees in an appropriate. It expressed concern over the effects of "free riders," that is, those employees required to be represented by the labor organization who enjoy all of the benefits and protections of the collective bargaining agreement, but make no contribution to the costs of that service and activity. The labor organization may enter a fair share agreement for defraying the costs of collective bargaining and contract administration among all those represented. However, the labor organization must establish its fair share fee through an audit of its costs to determine the percentage of dues that are attributable only to collective bargaining and contact administration purposes; provide an opportunity for represented public employee fee payers to register objections to that amount; and, if unresolved, submit contest 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, e.g., *Communications Workers of America v. Beck*, 487 U.S. 735 (1988); *Ellis v. Brotherhood of Railway Employees*, 466 U.S. 435 (1984).

C. Labor Organizations and Membership

Usually lost in the fog created by inappropriate interchange of terms is the nature of a labor organization and its membership. It is a contract.

These contracts include such common elements as purposes and objectives; governance structure; officer and board elections, and responsibilities and duties; budget and audit; levying dues; membership and member rights, privileges and responsibilities.

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[10] ORS 243.666 provides that: "(1) . . . Nevertheless any agreements 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 teachings of a church or religious body of which such employee is a member. Such employee shall pay an amount of money equivalent to regular union dues and initiation fees and assessments, if any, to a nonreligious charity or to another charitable organization mutually agreed upon by the employee affected and the representative of the labor organization to which such employee would otherwise be required to pay dues. The employee shall furnish written proof to the employer of the employee that this has been done."

Labor organizations themselves are not government enterprises. They are private, unincorporated associations, governed by their own constitutions and/or bylaws, and any promulgated rules. Some may be independent. Some may be affiliated with state or national organizations or both.

Neither the government nor courts at any level require private, unincorporated associations to constitute themselves in any specific configuration or composition, nor mandate any particular class or classes of membership, nor members' specific rights, privileges or responsibilities. Each is left to its own requisites for addressing and adjudicating internal matters in dispute between members and their organization; or between a local or chapter and its state or national affiliate. Disputes may ultimately be introduced in a court for resolution within the confines of the organization's governing documents authorities and requirements.

While some point to the Labor Management Reporting and Disclosure Act of 1959, As Amended (LMRDA),[11] which does provide certain general rights of members such as access to the governing documents, and standards of conduct such as for election of officers. However, there is threshold test or requirement defining membership, it does not apply to labor organizations representing only Oregon public employees. And in fact, whatever the LMRDA may say about member rights, the National Labor Relations Act (NLRA),[12] provides specifically that while it is an unfair labor practice for a labor organization or its agents to "restrain or coerce employees in the exercise or the rights guaranteed them in Section 7 of the Act, *it shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.*"[13,14] (*emphasis added*)

That the relationship between a labor organization and its members is a contract is a well established view of long standing. "Both sides accept the concept that the international constitution forms a contract between the local, and its members, and the international. *Way v. Patton et al,* 1952, 195 Or 36, 241 P2d 895, and many similar cases unnecessary to cite." *Crocker v. Weil*, 227 Or. 260 (1961), 361 P.2d 1014.[15] (*underline emphasis added*)

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[11] 29 U.S.C. 411
[12] 29 U.S.C. 151
[13] Compare ORS 243.672 "(2) 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."
[14] Section 8(b)(1)(A)
[15] Even in dissent where the issue was a specific solution to the issue in the dispute, it's agreed "that 'The legal theory defining the role of the court in internal union affairs is that the union constitution is a contract between the union and its members.' Summers, The Law of Union Discipline: What the Courts Do in Fact, 70 Yale L J 175 (1960). Some form of legal compact exists as a result of the constitution of [the union] to which [tbe local][has subscribed . . . Our previous cases, in line with the universal rule have described this form of agreement as a contact. Quinn v. Marvin, 168 Or 52, 57-58, 120 P2d 227 (1941); Carpenters Union v. Backman, 160 Or 520, 528, 86 P2d 456 (1939)." *Crocker v. Weil* 227. *id*

In *Carpenters Union v. Backman*, 160 Or. 520, 528 (Or. 1939), the Oregon Supreme Court describes that: "The charter, constitution and general laws of the Brotherhood, together with the local constitution and laws, constitute a contract which all members of the union who have assented thereto are bound to obey so long as they remain members of the union and, upon ceasing to be members of the union, they forfeit all right to the property and funds of the union and have no more right to control the disposition of such property and funds than if they had never been members thereof." The principle is widely held even beyond the borders of Oregon.[16]

Laws intruding into contracts are forbidden by the Oregon Constitution's Article 1, Section 21.[17]

II. Effects of Initiative Petition 62

As written IP 62 proposes to amend sections of the PECBA by:

- constructing a required membership regimen for any person or entity to qualify and act as a labor organization and thereby as an exclusive representative for any Oregon public employees (*IP 62 Section 4(1)*);
- requiring this membership for any person in a position included in an appropriate bargaining wishing to join and engage in activities and expenditures for representation and collective bargaining (*IP 62 Section 3(2)(b)*);

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[16] See *Holt v. Santa Clara County Sheriff's Benefit Association*, 250 CalApp2d 926 ("It appears to be the law of this state that dissolution of an unincorporated association may be brought about by the action of the association itself as provided for in its articles of association, charter, or by-laws. (Grand Grove U.A.O.D. v. Garibaldi Grove, 130 Cal. 116 [62 P. 486, 80 Am.St.Rep. 80]; Supreme Lodge of the World v. Los Angeles Lodge No. 386, 177 Cal. 132 [169 P. 1040].) The propriety of such a method of dissolution stems from the well-established principle that the constitution or by-laws of an unincorporated association have the force and effect of a contract between the association and its members as to which the members are bound and are charged with full knowledge. (Bowie v. Grand Lodge L.W., 99 Cal. 392, 395 [34 P. 103]; Levy v. Magnolia Lodge, I.O.O.F., 110 Cal. 297, 309-310 [42 P. 887]; Lawson v. Hewell, 118 Cal. 613, 618-619 [50 P. 763, 49 L.R.A. 400]; Robinson v. Templar Lodge, I.O.O.F., 117 Cal. 370, 373 [49 P. 170, 59 Am.St.Rep. 193]; Power v. Sheriffs' Relief Assn., 57 Cal. App. 2d 350, 352 [134 P.2d 827]; Weber v. Marine Cooks' & Stewards' Assn., 93 Cal. App. 2d 327, 334- 335 [208 P.2d 1009]; In re Terra, 111 Cal. App. 2d 452, 459 [244 P.2d 921]; Meyer v. Bishop, 129 Cal. 204, 206-207 [61 P. 919]; American Soc. of Composers, Authors & Publishers v. Superior Court, 207 Cal. App. 2d 676, 689 [24 Cal. Rptr. 772]; Grand Grove A.O. of D. v. Duchein, 105 Cal. 219, 224 [38 P. 947]; Subsidiary High Court A.O.F. v. Pestarino, 41 Cal. App. 712, 714 [183 P. 297].)") *id.* at 929.

Under the NLRA, the U.S. Supreme Court held in *National Labor Relations Board v. Boeing Company et al*, 412, U.S. 67, 93 S. Ct. 1952, 36 L.Ed. 2nd 752, that "Issues as to the reasonableness ore unreasonable of such fines must be decided upon the basis of law of contacts, voluntary associations, or such other principles of law as may be applied in a forum competent to adjudicate the issue."

[17] "No *ex-post facto* law, or law impairing the obligation of eontracts shall ever be passed, nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution; provided, that laws locating the Capitol of the State, locating County Seats, and submitting town, and corporate acts, and other local, and Special laws may take effect, or not, upon a vote of the electors interested."

- allow members to cancel membership at any time and cease payment of dues or any other money that may be required (*IP 62 Section 3(2)(c)*);
- denying the right of members of the organization to incorporate into their dues any expenditures not related to representation and collective bargaining (*IP 62 Section 3(2)(b;*);
- requiring any exclusive representative that meets these requirements to nevertheless bifurcate its income payments should members wish to contribute to other activities, using a statutorily defined process and statutory language for individual authorization to do so (*IP 62 Section 6(1)(a)*);
- limiting the kind and nature or any organizational member benefits the labor organization may wish to provide its members (*IP 62 Section 6(2)*);
- prohibiting certification of as an exclusive representative any organization that does not comport with these internal characteristics and processes (*IP 62 Section 4(1)*);
- replacing the unfair labor practice prohibitions in ORS 243.672, and the ERB's investigation and adjudication authority in ORS 243.676 with a civil action in circuit court (*IP 62 Section 7(1)*);
- removing from the Legislature its Constitutional authority to amend definitions (*IP 62 Section 7(4)*) in the PECBA, requiring that it may be done only by a vote of the public for the following terms:
  - ORS 243.650 (1) appropriate bargaining unit;
  - ORS 243.650 (4) collective bargaining;
  - ORS 243.650 (7) (a) through (g) Employment relations;
  - ORS 243.650 (8) Exclusive representative;
  - ORS 243.650 (13) Labor organization;
  - ORS 243.650 (19) Public employee; and
  - ORS 243.650 (20) Public employer.

Clearly, IP 62 includes multiple features would that fundamentally change the Public Employee Collective Bargaining Act in several ways. It also includes multiple subjects, both contrary to the requirement for initiative petitions.

If enacted, IP 62 would limit "the right of public employees to form . . . labor organizations of their choosing. . ."

- It would prevent any newly formed or existing labor organizations from becoming an exclusive representative unless and until the prescribed membership was incorporated into the organization.
- It would disqualify current exclusive representatives from continuing in that role, notwithstanding majority support of employees in the bargaining unit, unless and until the prescribed membership was incorporated into the organization.
- It would require exclusive representatives to immediately modify its dues by reducing them by that percentage that may be political or ideological expenditures; and require them to solicit by the prescribed process and with the prescribed language any such funds that members had heretofore been voluntarily paying through regular dues. These would

have consequential effects on any state or national organizations with which an exclusive representative may be affiliated, and membership and their rights and privileges are co-extensive, extending PECBA into regulation of internal matters of state or national unincorporated associations across state lines where PECBA is without authority.

- It deceptively nullifies the fair share provisions ORS 243.650(10) by first creating a membership limited to payment of collective bargaining and related activities, then allowing employees to cancel their membership and *cease payment of money of any kind*. Such bargaining unit employees would continue to receive the benefits of the collective bargaining agreement negotiated by the union.
- It would allow any public employee to bypass the unfair labor practice provisions and immediately pursue civil action for any perceived violation of the provisions of IP 62.

Underlying all of these features is a clear requirement that the contract relationship between members and their union be altered – reconstituted -- to comport with the requirements of IP 62. Failure to do so, or not done to the satisfaction of any individual in an appropriate unit would subject the members and their organization to lawsuit.

Finally, in the guise of a statutory initiative petition IP 62 would unconstitutionally limit the authority of the Legislature to amend a statute. IP 62 is not a proposed constitutional amendment, but placing a limit on legislative authority would require one.

III. The Draft Title

A. 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." *Caruthers v. Myers*, 344 Or 596, 601 (2008).

The draft caption is:

> "Public employee union cannot collect dues for uses other than representation, bargaining without member authorization."

This caption misses the point entirely. It is badly flawed because it does not accurately capture any of the effects of IP 62, and mischaracterizes the plain text. The misstatement would be misleading to petition signers and voters.

With financial support, especially fair share payments at the core of IP 62, the Attorney General would be best be guided by Supreme Court approved titles for IP 9 (2014) or IP 36 (2016) because, as noted above, IP 62 deceptively nullifies the fair share provisions. Under IP 62's dictated membership definition, member dues are equivalent to what a fair share payer would be obligated. But, with the right to cancel that membership and be relieved of any payment of any kind, they still be included in an appropriate unit, receive representation from the union and enjoy all the terms and conditions of the collective bargaining agreement. That is the "free rider" addressed by both the Oregon and U.S. Supreme Courts.

Similar circumstances in IP 9 (2014) resulted in the certified title: "Allows non-union member public employees receiving required union representative to refuse to share representation costs." IP 36 (2016) received the certified title: "Non-union public employees may benefit from union bargaining without sharing representation costs; modifies collective bargaining obligations."

The effects or IP 62 are enumerated above. Numerous as they are they present a challenge in capturing them in a 15 word statement. The draft title deficiencies can be cured if written to capture the actual major effect or effects, especially the "free rider" effects.

B. Results Statements

Results statements require a simple, understandable description of the result of the measure if approved or rejected. 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 *Nesbitt v. Myers*, 336 Or 424, 431 (2003).

1. Result of "Yes" Vote

The draft "Yes" Result Statement reads:

> "Result of 'Yes' Vote: 'Yes' vote prohibits public employee union from collecting dues from any member to fund activities unrelated to representation or collective bargaining, unless authorized by member."

This result statement is deeply flawed. It ignores the full range of requirements IP 62 places on public employee unions. It is much more than the collection and purpose of dues. They must redefine membership in their organizations and reduce their dues rate to the same as would otherwise be the non-member fair share fee. They must bifurcate their income in order to retain status as a certified exclusive representative. That is reached by limiting the dues to the cost of collective bargaining and contract administration, precisely the prescription required by the U.S.

Supreme Court in *Hudson, supra.* and developed in *Lehnert, supra.* The breadth of IP 62 presents a challenge to encapsulate in 25 words all of its characteristics. Nevertheless, ORS 250.0035(2)(b) requires a "simple and understandable statement of not more than 25 words that describe the result if the state measure is approved." The purpose is to "notify petition signers and voters the result or results of enactment that would have the greatest importance to the people of Oregon." *Novick v. Myers, Id.* at 574.

The deficiencies in the Attorney General's draft "Yes" result statement can be cured if written to capture the core effects, as discussed throughout, if IP 62 were enacted

2. Result of "No" Vote

The draft "No" Result Statement reads:

"Result of 'No' Vote: 'No' vote retains existing ability of public employee unions to collect dues from members for union purposes not directly related to representation or collective bargaining."

ORS 250.0035(2)(b) requires a "simple and understandable statement" also limited to 25 words, that described the "state of affairs" that describe the *status quo* if voters reject the initiative.

The current Public Employee Collective Bargaining Act does not intrude into the internal workings of the union. The only requirement the law places on a labor organization wishing to be designated an exclusive representative is that it have among its purposes "representing employees in their employment relations with public employers."[18]

The status quo is not simply the collection of dues and its purposes. The collective bargaining act is much broader.

The current law would continue certification of unions as exclusive representatives without regard to their membership or dues structures; leave to their internal governance matters of membership status, including withdrawal, and dues purposes and expenditures; and permit fair share agreements requiring a fee from non-members covering the costs of collective bargaining and contract administration, addressing "free rider" concerns. Complaints of violations of the rights would continue to be investigated and adjudicated by the ERB, rather than civil suit as IP 62 proposed. The inadequate draft "No" statement, should be corrected to reflect at least these matters.

C. Summary Statement

A ballot title is required under ORS 250.036(2)(d) to contain a statement of up to 125 words that accurately summarizes the measure and its *major effects*. It should provide petition signers and voters with information enough to understand what happens if they approve the measure.

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[18] ORS 243.650 (13)

The statement should reflect the "breadth of its impact." *Fred Meyer, Inc v. Roberts*, 308 Or 69, 175.

The draft Summary statement reads:

> "Summary: Currently the Employment Relations Board may certify, or a public employer may recognize, a union as the "exclusive representative" of all employees in an appropriate bargaining unit of public employees. A union may use member dues for some costs unrelated to bargaining or representation. Payments nonmembers are required to make may be used only for costs related to bargaining or representation. Measure provides Board cannot certify union as "exclusive representative" if it requires its members to make contributions that are spent on activities "not necessarily and reasonably incurred for the purpose of representation and collective bargaining." Measure permits union to separately collect itemized dues for activities unrelated to representation, collective bargaining only from its members who consent in writing to additional contributions. Other provisions."

This draft summary is insufficient. It does not fully capture the measure's major effects, which are numerous changes to the PECBA, and restricting the Legislature from making changes to certain terms in the collective bargaining law. The draft statement erroneously suggests the major effect is only to the purposes for financial support of the labor organization. As reviewed above, IP 62's central theme is to require labor organizations to establishing membership and limit dues for specific purposes and in specific manners. The draft summary isolates the financial interchange, when the measure clearly demands change to the internal membership and dues programs of the union.

Capturing all that's going on in IP 62 in an adequate summary poses a challenge. The reach of the measure includes ambiguities and uncertainties, which petition singers and voters should understand to effectively form their views. That notwithstanding, the insufficient draft summary should be re-written to capture current law and the full effects of the measure. Current law allows the ERB authority to certify exclusive representatives. Unions are allowed their own self-determined membership, dues, programs and activities. Fair share provisions can be negotiated. The "free rider" effect is addressed. For petition signers and voters to understand the full effects of the measure, the summary should reflect how representation will be limited to only certain organizations that conform to the measure's specific membership and dues provisions, while allowing "free riders." They should be informed of the shift requiring unions to annually solicit individual authority for additional funds for programs and activities apart from collective bargaining. And, especially, the summary should note that the Legislature cannot exercise is lawful, constitutional authority to make certain changes to the measure if enacted.

IV. IP 62 should not be certified

As noted in the comments above, I believe IP 62 is much more than statutory changes.

The Oregon Constitution, Article IV(1)(2)(d) provides: "A *proposed law* or amendment to the Constitution shall embrace *one subject only* and matters properly connected therewith." (*emphasis added*) The Oregon Supreme Court fully explored these limitations in *Armatta v. Kitzhaber,* 327 Or. 250, 959 P.2d 49 (1998).

IP 62 suggests compliance with the single subject and related matters requirement for changes to current law. But it uses a statutory initiative as disguise to intrude into constitutional matters. Its intrusion into the contract between a union and its members clearly implicates the proposal as an effort to circumvent constitutional prohibitions or to create a *defacto* constitutional exception in the case of labor organizations. Either way, the result is inescapable interference in contracts.

IP 62 also imbeds a roadblock to Legislature by prohibiting it from making any changes to a selection of stator terms in the PECBA. Limitations or other changes to constitutional authority requires a proposal by the Legislature or by initiative. Such an initiative is subject to greater support than an initiative proposing or addressing statutes. It also requires both a single subject and a separate vote. Curtailing legislative authority to amend statutes is a separate and distinct subject from the labor law changes proposed in IP 62. It is the underlying authority of the Legislature that is the issue in IP 62's Section 8(1). Certainly, this is a separate subject from the other provisions of IP 62.

Amending fundamental law requires both a single subject and separate vote. IP 62 attempts an end run around the differences between statutory initiatives and constitutional amendment initiatives. For this reason alone, IP 62 does not comply with the requirements in the Oregon Constitution for an initiative petition.

For these reasons, the Attorney General should reject IP 62 as invalid and not certify any title.

V. Conclusion

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 determination that IP 62 invalid because it mixes statutory and constitutional provisions, and contains more than one proposed law in violation of the Oregon Constitution; or alternatively, 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.

Richard H. Schwarz
3411 NW Vaughn Street
Portland, Oregon 97210
(503) 248-9229

OFFICE OF THE SECRETARY OF STATE

JEANNE P. ATKINS
SECRETARY OF STATE

ROBERT TAYLOR
DEPUTY SECRETARY OF STATE

ELECTIONS DIVISION

JIM WILLIAMS
DIRECTOR

255 CAPITOL STREET NE, SUITE 501
SALEM, OREGON 97310-0722

(503) 986-1518

INITIATIVE PETITION

TO: All Interested Parties

FROM: Lydia Plukchi, Compliance Specialist

DATE: October 29, 2015

SUBJECT: Initiative Petition **2016-062** Draft Ballot Title

The Elections Division received a draft ballot title from the Attorney General on October 29, 2015, for Initiative Petition **2016-062**, proposed for the November 8, 2016, General Election.

Caption

Public employee union cannot collect dues for uses other than representation, bargaining without member authorization

Chief Petitioners

Maggie Neel PO Box 2111 Lebanon, OR 97355
Mike Forest PO Box 7524 Salem, OR 97303

Comments

Written comments concerning the legal sufficiency of the draft ballot title may be submitted to the Elections Division. Comments will be delivered to the Attorney General for consideration when certifying the ballot title.

Additionally, the Secretary of State is seeking public input on whether the petition complies with the procedural constitutional requirements established in the Oregon Constitution for initiative petitions. The Secretary will review any procedural constitutional comments received by the deadline and make a determination whether the petition complies with constitutional requirements.

To be considered, draft ballot title comments and procedural constitutional requirement comments must be received in their entirety by the Elections Division no later than 5 pm:

Comments Due	How to Submit	Where to Submit
November 13, 2015	Scan and Email	irrlistnotifier.sos@state.or.us
	Fax	503.373.7414
	Mail	255 Capitol St NE Ste 501, Salem OR 97310

ELLEN F. ROSENBLUM
Attorney General

FREDERICK M. BOSS
Deputy Attorney General

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

October 29, 2015

Jim Williams
Director, Elections Division
Office of the Secretary of State
255 Capitol St. NE, Suite 501
Salem, OR 97310

Re: Proposed Initiative Petition — Public Employee Union Cannot Collect Dues for Uses Other Than Representation, Bargaining Without Member Authorization
DOJ File #BT-62-15; Elections Division #2016-062

Dear Mr. Williams:

We have prepared and hereby provide to you a draft ballot title for the above-referenced prospective initiative petition. The proposed measure relates to prohibiting public employee unions from collecting dues for uses other than representation or bargaining without the authorization of members.

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.

Alicia Thomas
Legal Secretary

AFT/6894662

Enclosure

Maggie Neel
P.O. Box 2111
Lebanon, OR 97355

Mike Forest
P.O. Box 7524
Salem, OR 97303

DRAFT BALLOT TITLE

Public employee union cannot collect dues for uses other than representation, bargaining without member authorization

Result of "Yes" Vote: "Yes" vote prohibits public employee union from collecting dues from any member to fund activities unrelated to representation or collective bargaining, unless authorized by member.

Result of "No" Vote: "No" vote retains existing ability of public employee unions to collect dues from members for union purposes not directly related to representation or collective bargaining.

Summary: Currently, the Employment Relations Board may certify, or a public employer may recognize, a union as the "exclusive representative" of all employees in an appropriate bargaining unit of public employees. A union may use member dues for some costs unrelated to bargaining or representation. Payments nonmembers are required to make may be used only for costs related to bargaining or representation. Measure provides that Board cannot certify union as "exclusive representative" if it requires its members to make contributions that are spent on activities "not necessarily and reasonably incurred for the purpose of representation and collective bargaining." Measure permits union to separately collect itemized dues for activities unrelated to representation, collective bargaining only from its members who consent in writing to additional contributions. Other provisions.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on January 5, 2016, I directed the original Respondent's Answering Memorandum to Petitions to Review Ballot Title Re: Initiative Petition No. 62 to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Steven C. Berman, attorney for petitioner Heather Conroy; Nathan R. Rietmann, attorney for chief petitioners Maggie Neel and Mike Forest; and Aruna A. Masih, attorney for petitioners Trent Lutz, Richard Schwarz, and Hanna Vaandering, using the court's electronic filing system.

/s/ Shannon T. Reel

SHANNON T. REEL #053948
Assistant Attorney General
shannon.t.reel@doj.state.or.us

Attorney for Respondent
Ellen Rosenblum, Attorney General,
State of Oregon

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 378-4402