IN THE SUPREME COURT OF THE STATE OF OREGON

GAIL RASMUSSEN AND BETHANNE DARBY, Petitioners, v. ELLEN ROSENBLUM, Attorney General, State of Oregon, Respondent.	Supreme Court Case No. PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL Initiative Petition 9 (2014)

Initiative Petition 9 (2014)
Ballot Title Certified April 23, 2013

Chief Petitioners:

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PETITIONER'S INTEREST

Pursuant to ORS 250.085(2) and ORAP 11.30, Petitioners Gail Rasmussen and BethAnne Darby ask the court to review the ballot title for Initiative Petition 9 (2014), certified by the Attorney General on April 23, 2013 and to certify a modified ballot title that complies with the statutory standards. Rasmussen and Darby are Oregon electors who timely submitted written comments and therefore have standing to seek review.[1]

ARGUMENTS AND AUTHORITIES

I. Introduction

Initiative petition 9 (2014) is a statutory proposal to amend the Oregon Public Employee Collective Bargaining Act. ORS 243.650 *et seq*. Often referred to by its political slogan, "Right to Work," IP 9 would prohibit public employee unions and public employers from negotiating "fair share agreements" that require covered employees to pay for representation services they receive. Because unions are required to represent all covered employees, regardless of union membership or financial contribution, this means that IP 9 would allow employees to receive the benefits of union representation without having to share in the costs of that representation, i.e., it would permit "free riders."

IP 9 is not a new concept in Oregon. Similar initiatives have been filed since 1994, and the Supreme Court has repeatedly been asked to review the ballot titles for those initiatives. *See, e.g., Sizemore v. Myers*, 342 Or 578, 157 P3d 188 (2007); *Bosak v. Myers,* 332 Or 552, 33 P3d 970 (2001); *Novick v. Myers,* 333 Or 18, 26 P3d 464 (2001); *Dale v. Kulongoski*, 321 Or 108, 894 P2d 462 (1995); *Crumpton v. Kulongoski*, 319 Or 83, 873

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[1] A copy of IP 9 is attached as Exhibit 1; the draft ballot title is attached as Exhibit 2; Petitioners' comments are attached as Exhibit 3; the Attorney General's explanatory letter is attached as Exhibit 4; and the certified ballot title is attached as Exhibit 5.

P2d 314 (1994); *Sizemore v. Kulongoski*, 319 Or 82, 873 P2d 314 (1994). In those cases, the court affirmed that the ballot title must clearly explain the "free rider" concept, and that it must not mislead voters, even by implication, regarding current law.

For IP 9, the Attorney General issued a draft ballot title that was remarkably inconsistent with the court precedents, a point which Petitioners and others raised in their comments. In response, the Attorney General modified the ballot title to eliminate the most blatant problems, but continued to ignore court precedent. The certified ballot title still fails to adequately identify the "free rider" concept as required by *Sizemore v. Myers* and prior cases. It also continues to use loaded and misleading language to suggest that current law requires "compulsory" payments to the union when that is not the case; any such requirement must be negotiated in a "fair share agreement" between the union and employer. ORS 243.650(10). In short, as discussed in detail below, the certified ballot title fails to substantially comply with the statutory standards and must be modified.

II. Legal Framework

Oregon's Public Employee Collective Bargaining Act (the PECBA), like its federal counterpart, establishes a system under which employees can elect to be represented by a union. ORS 243.650 *et seq.* Once a majority of the employees who would be covered by a collective bargaining agreement choose a union to represent them, the law imposes a number of rights and responsibilities on the union. First and foremost, the union has a duty to fairly represent all employees in the bargaining unit, in both collective bargaining and contract enforcement. This is known as the union's "duty of fair representation" and exists independently of union membership or the collective bargaining agreement.

ORS 243.672 (2)(a); *Putvinskas v. SWOCC Classified Federation, AFT and SWOCC*, 18 PECBR 882, 894 (2000); *Novick v. Myers,* 333 Or at 25.

As a reciprocal right, the PECBA allows public employee unions to negotiate provisions in collective bargaining agreements to require all covered employees to pay their fair share of representation costs or "payments-in-lieu-of-dues". ORS 243.650(18). In Oregon, these provisions are known "fair share agreements." ORS 243.650(10).[2] These agreements are allowed in order to avoid the "free rider" problem.[3] Under the PECBA, if thirty percent of covered employees object to a fair share agreement, they can vote to rescind the agreement. ORS 243.650(10). Some, but not all, public employee collective bargaining agreements in Oregon include fair share agreements.

III. The Certified Ballot Title Fails to Meet the Statutory Standards

A. Caption

As the court has repeatedly emphasized, the caption is the "headline" for the ballot title and it must identify the proposal's subject matter in terms that will not "confuse or mislead potential petition signers and voters," even by implication. *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)). The "subject matter" of a proposal is the "actual major effect" or effects

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[2] Although Petitioners cautioned against the ballot title using the term "fair share" without further explanation (*see* Petitioners' Comments, Ex. 3, p. 6), they will use it in this petition since it is defined legal term. ORS 243.650(10). In addition, so long as the ballot title otherwise describes the free rider concept in plain English, it may be permissible to refer to "fair share agreements" in quotations. *See Crumpton, supra.,* 319 Or at 83.

[3] The United States Supreme Court first referred to the "free rider" problem in *Abood v. Detroit Board of Education*, 431 US 209, 97 S Ct 1782, 52 L Ed 2d 261, 95 LRRM 2411, (1977)("A union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become "free riders" – to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees"). *See also, Dale,* 321 Or at 111-112; *Sizemore,* 342 Or at 193.

of the measure, determined by examining the changes proposed by the measure in the context of existing law. *Lavey v. Kroger,* 350 Or 559, 563, 285 P3d 1194 (2011); *Rasmussen v. Kroger,* 350 Or 281, 285, 253 P3d 1031 (2011).

The Attorney General's caption does not meet these standards. It reads:

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

There are three main problems. First, this statement does not adequately identify the "actual major effect" of the measure – to allow employees to refuse to share in the costs of representation that the union is legally obligated to provide. This is the "free rider" concept that the court has held to be the central subject of these kinds of measures. As the court explained in *Sizemore v. Myers:*

> "In context, the subject matter of the proposed measure consists of two identifiable legal changes. The proposed measure will eliminate any employment condition requiring any person to pay money to a union, and, thereby, *it will entitle employees to receive the union's legally mandated representation services without sharing in the cost of those services.* The certified caption refers to only one of those subjects. Consequently, it "understate[s] * * * the scope of the legal changes that the proposed measure would enact." (Citations omitted; emphasis added)

342 Or at 588-589.

The Attorney General may claim that the reference to "union representation costs" is sufficient to identify this subject. The argument should be rejected. Voters will not understand from the caption that "union representation costs" are for representation services that the union is legally obligated to provide and that the employee actually receives, regardless of union membership or financial contribution. Rather, the oblique reference to "union representation costs" misleadingly suggests that current law allows a union to unilaterally require an employee to pay for the union's general expenses -- "union

representation costs" -- without providing anything in return. Stated differently, voters reading the caption will have no idea *who* receives the union representation costs, or *what* the union representation costs are for.[4] In fact, the unqualified reference to "employees choosing not to join union" suggests that all employees declining to join a union – including employees voting in a representation election under ORS 243.686 – would be required to pay union representation costs, regardless of whether the union actually represented the employees. Of course, that is not the law, but the point demonstrates why it is essential that the caption make clear that payments are for representation services the employee receives. In short, the caption fails to adequately identify the "free rider" problem and must be modified.

The second problem is that the phrase "prohibits compulsory payment" is misleading and biased. By using the passive voice, the caption creates the impression that current law either requires all public employees "choosing not to join union" to make "compulsory payments," or current law allows unions to unilaterally require such payments. Either is false. Current law does not *compel* employees to pay for representation services they receive; it simply *allows* public employers and public employee unions to negotiate "fair share agreements." ORS 243.666 and 243.672(1)(c).[5] The caption cannot suggest otherwise, even by implication. *Bosak v. Myers, supra,* 332

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[4] *See, e.g., Crumpton v. Kulongoski,* 319 Or 82, 85-86, 873 P2d 314 (1994) ("[T]he term 'fair share,' apart from the statutory definition, ordinarily is linked to a subject. One might ask, 'Fair share of what?' The obvious statutory answer is the employee's fair share of the cost of services for representation in labor-management negotiations and in contract administration. *See* ORS 243.650 (10) and (16) (so indicating). Without some further explanation to that effect, however, the term 'fair share' does not reasonably identify to the voter the subject of the measure.")

[5] Current law certainly does not require unrepresented employees who choose not to join the union to make any payments for union representation.

Or at 555 (disputed phrase "would likely mislead voters into believing that, under current law, a union unilaterally may require employees to pay for representation services"); *Novick v. Myers, supra,* 33 Or at 27 (same); *Sizemore v. Kulongoski,* 322 Or at 236 (same).

The fundamentally misleading and biased tone of the caption is compounded by the use of the term "compulsory." This is because the term "compulsory" typically signals a *legal* requirement, such as "compulsory school attendance" (ORS 339.010 *et seq.*) or "compulsory retirement" (*see, e.g.,* ORS 238.525 and ORS 659A.030(3). It is not commonly used to describe contractual requirements, even though contracts can clearly compel certain conduct (such as hours of work, uniform requirements, minimum qualifications), perhaps because those requirements expire or can be renegotiated. *See. e.g., OSEA, Chapter 7 v. Salem School Dist., 24J*, 6 PECBR 5036, 5048 (1982) (fair share is a "purely contractual" right that expires with the contract).

In addition, in common usage, the term "compulsory" is an emphatic adjective that conjures the image of someone being forcibly required to do something against one's will – the proverbial "gun to the head."[6] Certainly, for some employees, being required to pay fair share fees may be extremely objectionable,[7] but for others, they may simply not want to join or participate in the union but otherwise understand the need to share in the costs of representation they receive. In sum, the use of the term "compulsory" to describe fair share payments is unnecessary and inflammatory and likely to be interpreted by voters as

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[6] *Webster's Third International Dictionary, unabridged*, p. 468 includes the following definition for compulsory: " * * * 2. Having the power of compulsion: coercive, compelling."

[7] In fact, public employees who have *bona fide* religious objections to joining or supporting a union cannot be required to pay the union anything. Instead, the statute requires the amount of the payment-in-lieu-of-dues to be sent to a mutually agreeable non-religious charity. ORS 243.666.

an argument for the proposed measure. That is impermissible. *Sizemore, supra*, 342 Or at 589 (on referral, the Attorney General should not label the union's services as "benefits" – even the court uses the term elsewhere – because "voters may interpret that terminology as an argument against the proposed measure.").

Finally, the choice of characterizing payments made pursuant to fair share agreements as "compulsory" while saying nothing about the union's duty of fair representation compounds the shortcomings discussed above and reveals a bias that runs throughout the ballot title. If current law compels anything, it is the duty of a union to represent all covered employees regardless of membership or financial support. By prohibiting fair share agreements, IP 9 allows employees to receive the benefits of representation without sharing in the costs. As the court recognized in *Sizemore, supra,* that is the actual subject of the measure, and must be identified in the caption. It is not, rendering the caption non-compliant.

A last, separate problem is that the caption does not alert voters to the fact that the proposal creates a new enforcement scheme. Inclusion of this subject is necessary because IP 9 does not use the existing unfair labor practices as the enforcement mechanism, but rather creates new ones dealing specifically with this violation. As in *Sizemore v. Myers,* it is not a "mere procedural detail," but rather a substantive aspect of the proposal which must be included. 342 Or at 588; *Greenberg v. Myers*, 340 Or 65, 68, 127 P3d 1192 (2006) (new enforcements mechanisms were not "mere procedural details" and therefore needed to be referenced in the caption).

The following alternative closely tracks that approved by the court for IP 48 (2008).

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

B. Result Statements

ORS 250.035(2)(b) and (c) require 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 or rejected. The purpose of "yes" vote result statement is to "notify petition signers and voters of the result or results of enactment that would have the greatest importance to the people of Oregon." *Novick v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). In contrast, the "no" result statement must explain to voters "the state of affairs" that will exist if the initiative is rejected, that is, the status quo. *Nesbitt v. Myers*, 335 Or 424, 432-33, 71 P3d 530 (2003).

The Attorney General certified the following result statements:

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

These statements suffer from the same shortcomings as the caption. Even though there are more words to work with, neither statement describes the free rider concept in easily understood terms. They also continue to misleadingly suggest that current law requires payment-in-lieu-of-dues when, in fact, current law simply allows the parties to negotiate fair share agreements.

In addition, the bias inherent in characterizing fair share payments as "compulsory" is exaggerated by the phrase "prohibits *requiring* [employees to make] *compulsory"* payments in lieu of dues in the "yes" vote result statement. There is absolutely no reason

to use both "requiring" and "compulsory," except to reinforce the proponents' political argument that unions coerce unwilling employees to make payments to a union. Coupled with the failure to plainly explain the free rider concept, the use of both "requiring" and "compulsory" renders the statement impermissibly biased.

The following alternative tracks that certified for IP 48 and demonstrates that it is possible to accurately and fairly describe the results of a vote within the word limits.[8]

> **RESULT OF "YES" VOTE:** "Yes" vote allows public employees to receive representation that union is required to provide without paying for that representation; creates new "unfair labor practice"
>
> **RESULT OF "NO" VOTE:** "No" vote retains current law: collective bargaining agreements may require union-represented public employees to share costs of representation union is legally required to provide.

D. Summary

ORS 250.035(2)(d) requires that the ballot title contain a 125 word summary which accurately and impartially summarizes the measure and its major effects, with the goal of providing 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). While the certified ballot title is an improvement over the draft, it still fails to substantially comply with the statutory standards for many of the same reasons discussed above. For a subject that is both politically charged and misunderstood, it is essential that the summary describe current law comprehensively. The summary's description is generally accurate but incomplete and not easily understood. *See Petitioners' Comments,* Ex. 3, pp. 8-10. It also fails to explain that under current law, fair share

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[8] It also includes detail regarding the enforcement mechanism. That information must be included as high up in the ballot title as possible. *Greenberg v. Myers,* 340 Or at 70.

agreements can be rescinded by a majority vote of the covered employees. ORS 243.650(10). That detail is clearly relevant, given political claims that employees have no choice about whether to make payments-in-lieu-of-dues, and easy to convey, as demonstrated by Petitioners' proposed alternative. *Petitioners' Comments,* Ex. 3, p. 10.

The description of how the measure works is also inadequate and biased. Notwithstanding additional word space, voters are still not told in plain English that the measure allows covered employees to refuse to pay for services that the union is legally required to provide. (*See discussion supra at pp. 4-5.)* On the other hand, the summary uses scarce words to tell voters that the proposal "affirms" an employee's right to not join a union, an entirely superfluous statement. More fundamentally, by repeating the already inflammatory term "compulsory" three times, particularly in combination with "requiring," the summary is patently biased in favor of passage. It must be revised.

As with the other sections of the ballot title, the summary for IP 48 demonstrates that it is possible to accurately include all of the key concepts within the word space available. Petitioners' comments include a proposal that closely tracks that certified for IP 48 and is incorporated by this reference. Ex. 3, p. 10.

CONCLUSION

For the reasons stated herein, the Court should find that the ballot title certified by the Attorney General fails to substantially comply with the statutory standards and certify a ballot title that does so.

DATED May 7, 2013.

Respectfully Submitted,
BENNETT, HARTMAN, MORRIS & KAPLAN, LLP
*s/*Margaret S. Olney
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March 18, 2013

To All Interested Parties:

Secretary of State Kate Brown is responsible for the pre-election review of proposed initiative petitions for compliance with the procedural constitutional requirements established in the Oregon Constitution for initiative petitions. This review will be completed before approving the form of the cover and signature sheets for the purpose of circulating the proposed initiative petition to gather signatures.

The Secretary of State is seeking public input on whether proposed initiative petition (#9), satisfies the procedural constitutional requirements for circulation as a proposed initiative petition. Petition #9 was filed in our office on March 15, 2013, by Jill Gibson Odell and Libby Braeda, for the General Election of November 4, 2014.

A copy of the text of this proposed initiative petition is on the second page of the letter. If you are interested in providing comments on whether the proposed initiative petition meets the procedural constitutional requirements, please write to the secretary at the Elections Division. Your comments, if any, must be received by the Elections Division no later than April 8, 2013, in order for them to be considered in the review.

KATE BROWN
Secretary of State

BY:

Lydia Plukchi
Compliance Specialist

SECTION 1. This 2014 Act shall be known as the Public Employee Choice Act.

SECTION 2. The people of Oregon find that:

(1) A person shall have the individual freedom of choice in the pursuit of public employment;

(2) A person shall not be required to abstain or refrain from membership in any labor organization as a condition of public employment or continuation of public employment. The inherent right to work shall not be denied on account of an employee's choice to bargain collectively through a labor organization;

(3) A person shall not be required to become or remain a member of a labor organization as a condition of public employment or continuation of public employment. The inherent right to work shall not be denied on account of an employee's choice not to bargain collectively through a labor organization.

(4) A person who does not choose to become a member of any labor organization shall not be required to pay any organization or third party an amount that is in lieu of any portion of dues, fees, or other charges required of labor organization members.

SECTION 3. ORS 243.662 is amended to read:

243.662. **(1)** Public employees have the right **and freedom to choose whether or not** to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations.

(2) If an employee does not choose to join and participate in a labor organization, such employee shall not pay an amount of money in-lieu-of-dues to a labor organization, another organization, or third party as a condition of employment.

SECTION 4. ORS 243.666 is amended to read:

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. [*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.*]

(2) Notwithstanding the provisions of subsection (1) of this section, an individual employee or group of employees at any time may present grievances to their employer and have such grievances adjusted, without the intervention of the labor organization. [*, if:*

(a) The adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect; and

(b) The labor organization has been given opportunity to be present at the adjustment.]

(3) Nothing in this section prevents a public employer from recognizing a labor organization which represents at least a majority of employees as the exclusive representative of the employees of a public employer when the board has not designated the appropriate bargaining unit or when the board has not certified an exclusive representative in accordance with ORS 243.686.

SECTION 5. 243.672 is amended to read:

243.672. (1) It 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.

(b) Dominate, interfere with or assist in the formation, existence or administration of any employee organization.

(c) Discriminate in regard to hiring, tenure or any terms or condition of employment for the purpose of encouraging or discouraging membership in an employee organization. [*Nothing in this section is intended to prohibit the entering into of a fair-share agreement between a public employer and the exclusive bargaining representative of its employees. If a "fair-share" agreement has been agreed to by the public employer and exclusive representative, nothing prohibits the deduction of the payment-in-lieu-of-dues from the salaries or wages of the employees.*]

(d) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition or complaint or has given information or testimony under ORS 243.650 to 243.782.

(e) Refuse to bargain collectively in good faith with the exclusive representative.

(f) Refuse or fail to comply with any provision of ORS 243.650 to 243.782.

(g) Violate the provisions of any written contract with respect to employment relations including an agreement to arbitrate or to accept the terms of an arbitration award, where previously the parties have agreed to accept arbitration awards as final and binding upon them.

(h) Refuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign the resulting contract.

(i) Enter into an agreement whereby employees who do not choose to become a member of a labor organization make payments in-lieu-of-dues to a labor organization, another organization, or a third party. Such agreements are prohibited.

(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.

(b) Refuse to bargain collectively in good faith with the public employer if the labor organization is an exclusive representative.

(c) Refuse or fail to comply with any provision of ORS 243.650 to 243.782.

(d) Violate the provisions of any written contract with respect to employment relations, including an agreement to arbitrate or to accept the terms of an arbitration award, where previously the parties have agreed to accept arbitration awards as final and binding upon them.

(e) Refuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign the resulting contract.

(f) For any labor organization to engage in unconventional strike activity not protected for private sector employees under the National Labor Relations Act on June 6, 1995. This provision applies to sitdown, slowdown, rolling, intermittent or on-and-off again strikes.

(g) For a labor organization or its agents to picket or cause, induce, or encourage to be picketed, or threaten to engage in such activity, at the residence or business premises of any individual who is a member of the governing body of a public employer, with respect to a dispute over a collective bargaining agreement or negotiations over employment relations, if an objective or effect of such picketing is to induce another person to cease doing business with the governing body member's business or to cease handling, transporting or dealing in goods or services produced at the governing body's business. For purposes of this paragraph, a member of the Legislative Assembly is a member of the governing body of a public employer when the collective bargaining negotiation or dispute is between the State of Oregon and a labor organization. The Governor and other statewide elected officials are not considered members of a governing body for purposes of this paragraph. Nothing in this paragraph may be interpreted or applied in a manner that violates the right of free speech and assembly as protected by the Constitution of the United States or the Constitution of the State of Oregon.

(h) For any labor organization to enter into an agreement whereby employees who do not choose to become a member of a labor organization make payments in-lieu-of-dues to a labor organization, another organization, or a third party. Such agreements are prohibited.

(3) An injured party may file a written complaint with the Employment Relations Board not later than 180 days following the occurrence of an unfair labor practice. For each unfair labor practice complaint filed, a fee of $300 is imposed. For each answer to an unfair labor practice complaint filed with the board, a fee of $300 is imposed. The board may allow any other person to intervene in the proceeding and to present testimony. A person allowed to intervene shall pay a fee of $300 to the board. The board may, in its discretion, order fee reimbursement to the prevailing party in any case in which the complaint or answer is found to have been frivolous or filed in bad faith. The board shall deposit fees received under this section to the credit of the Employment Relations Board Administrative Account.

SECTION 6. The Public Employee Choice Act shall not apply to any collective bargaining agreement or contract between an employer and a labor organization entered into before the effective date of the Act but shall apply to a renewal or extension of the contract or agreement or to a new contract or agreement entered into after the effective date the Act.

SECTION 7. This act does not limit, impair, or affect the right of a public employee to the expression or communication of a view, grievance, complaint, or opinion on any matter related to the conditions or compensation of public employment or their betterment as long as the expression or communication does not interfere with the full, faithful, and proper performance of the duties of employment.

OFFICE OF THE SECRETARY OF STATE

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For Immediate Release:
March 25, 2013

Contact: Lydia Plukchi
Elections Division
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The Office of the Secretary of State received a draft ballot title from the Attorney General on March 25, 2013, for initiative petition #9, proposing a statutory amendment, for the General Election of November 4, 2014.

The draft ballot title is as follows:

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

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

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

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

Chief Petitioner(s): Jill Gibson Odell, NW Shadow Hills Lane, Beaverton, OR 97006 and Libby Braeda, Espana Avenue N, Keizer, OR 97303.

Copies of the text of this initiative are available at Suite 501, 255 Capital St NE for $.25. Written requests for copies with your remittance of $1.00 prepaid, should be addressed to: Elections Division, 255 Capital St NE Ste 501, Salem, OR 97310.

There now follows a comment period of 10 business days during which any member of the public may submit written comments which address the specific legal standards a ballot title must meet to the Secretary of State's office. This period ends April 8, 2013. Comments must be addressed to: Elections Division, 255 Capital St NE Ste 501, Salem, OR 97310; fax (503) 373-7414.

The Secretary of State will deliver all written comments to the Attorney General. If comments are received, the Attorney General shall issue the certified ballot title not later than the 10th business day after receiving the comments from the Secretary of State. If no comments are received, the Attorney General shall issue the certified ballot title not later than the 10th business day after the deadline for submitting comments.

In addition, during this ballot title comment period, the Secretary of State will also seek statements from interested persons regarding whether or not a proposed initiative petition complies with procedural constitutional requirements for submission of proposed initiative petitions. The Secretary will consider the information provided in the statements received from interested persons. If you wish to comment, this period ends April 8, 2013. Comments must be addressed to: Elections Division, 255 Capitol St NE, Suite 501, Salem, OR 97310; fax (503) 373-7414.

Any elector who is dissatisfied with the ballot title certified by the Attorney General, and who timely submitted written comments which addressed the specific legal standards a ballot title must meet, may petition the Oregon Supreme Court seeking a different title. This appeal must be filed not later than the 10th business day after the Attorney General certifies a ballot title to the Secretary of State.

The required number of signatures for placement on the 2014 General Election ballot is 87,213. These signatures shall be filed in this office not later than July 3, 2014.

ELLEN F. ROSENBLUM
Attorney General

MARY H. WILLIAMS
Deputy Attorney General

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

March 25, 2013

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

Re: Proposed Initiative Petition — Prohibits Requiring Union Membership As Condition Of Public Employment; Prohibits Requiring "Fair Share" Fee Payments
DOJ File #BT-9-13; Elections Division #9

Dear Mr. Trout:

We have prepared and hereby provide to you a draft ballot title for the above-referenced prospective initiative petition. The proposed measure relates to prohibiting the requirement of union membership as a condition of public employment and prohibiting requiring the payment of "fair share" fees from public employees who choose not to join a union.

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

A copy of the draft ballot title is enclosed.

DFZ:mlk/4076519

Enclosure

Jill Gibson Odell
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DRAFT BALLOT TITLE

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

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

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

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

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April 8, 2013

Via Fax: (503)373-7414

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

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

Dear Secretary Brown:

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

1. INTRODUCTION

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

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

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

2. LEGAL FRAMEWORK

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

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

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

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

3. CAPTION

ORS 250.035(2)(a) provides that a ballot title contain "a [c]aption of not more than 15 words that reasonably identifies the subject matter of the state measure." The caption is the "headline" or "cornerstone for the other portions of the ballot title" and in order to comply with the statute, it must identify the proposal's subject matter in terms that will not "confuse or mislead potential petition signers and voters." *Kain/Waller v. Myers,* 337 Or 36, 40, 93 P3d 62 (2004) (quoting *Greene v. Kulongoski,* 322 Or 169, 174–75, 903 P2d 366 (1995)). As the court recently emphasized, the "subject matter" is the "actual major effect" or effects of the measure. *Lavey v. Kroger,* 350 Or 559, 563, 285 P3d 1194 (2011). "To identify the 'actual major effect' of a measure, this court examines the text of the proposed measure to determine the changes that the proposed measure would enact in the context of existing law and then examines the caption to determine whether the caption reasonably identifies those effects." *Rasmussen v. Kroger,* 350 Or 281, 285, 253 P3d 1031 (2011).

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

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

There are two main problems, both of which have been squarely addressed by the Oregon Supreme Court. First, the phrase "prohibits requiring union membership as condition of public employment" is inaccurate and misleading because it implies that current law permits compulsory union membership when it does not. *Sizemore v. Myers,* 342 Or 578, 157 P2d 188 (2007); *Dale v. Kulongoski,* 321 Or 108, 113, 894 P2d 462 (1995). Second, the caption fails to convey the true subject of the proposal – to allow

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

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

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

342 Or at 585 (Emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. RESULT OF "YES" VOTE

ORS 250.035(2)(b) requires that a ballot title contain a "simple and understandable statement of not more than 25 words that describes the result if the state measure is approved." The purpose of this section of the ballot title is to "notify petition signers and voters of the result or results of enactment that would have the greatest importance to the people of Oregon." *Novick v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). Where the enforcement scheme is new and not just "mere procedural details," that enforcement scheme becomes one of the "major changes" or "results of enactment" that must be described to voters as high up in the ballot title as possible. *Greenberg v. Myers*, 340 Or 65, 70, 127 P3d 1192 (2006); *Sizemore v. Myers/Terhune*, 342 Or 578, 157 P3d 188, (2007). Typically, the "yes" vote result statement builds on the caption.

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

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

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

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

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

5. RESULT OF "NO" VOTE:

ORS 250.035(2)(c) requires that the ballot title contain a "simple and understandable statement" of up to 25 words, explaining "the state of affairs" that will exist if the initiative is rejected, that is, the *status quo*. It is also essential that the law described in the "no" vote result statement concern the subject matter of the proposal. Otherwise, the description could mislead voters about the effect of their vote. *Nesbitt v. Myers*, 335 Or 219, 223, 64 P3d 1133 (2003). Finally, it is generally impermissible for the "no" result statement to simply state that a "no" vote rejects the "yes" vote. *Nesbitt v. Myers*, 335 Or 424, 431, 71 P3d 530 (2003).

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

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

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

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

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

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

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

6. SUMMARY

ORS 250.035(2)(d) requires that the ballot title contain a summary which accurately summarizes the measure and its major effects in a concise and impartial manner. The goal is to provide voters with enough information to understand what

will happen if the measure is approved and the "breadth of its impact." *Fred Meyer, Inc. v. Roberts*, 308 Or 169, 175, 777 P2d 406 (1989).

The draft summary reads:

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

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

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

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

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

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

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

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

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

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

7. CONCLUSION

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

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

Sincerely,

Bennett, Hartman, Morris & Kaplan, LLP

MSO:kaj
cc: Clients

ELLEN F. ROSENBLUM
Attorney General

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DEPARTMENT OF JUSTICE
APPELLATE DIVISION

April 23, 2013

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

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

Dear Mr. Trout:

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

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

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

The Caption

The draft caption provides:

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

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

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

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

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

We have modified the draft caption and certify the following:

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

The "Yes" Result Statement

The draft "Yes" result statement provides:

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

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

We certify the following "Yes" result statement:

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

The "No" Result Statement

The draft "No" result statement provides:

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

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

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

We certify the following "No" result statement:

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

The Summary

The draft summary provides:

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

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

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

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

We certify the following summary:

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

Conclusion

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

Sincerely,

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

DFZ:mlk/4134254

Enclosure
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Certified by Attorney General on April 23, 2013.

BALLOT TITLE

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

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

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

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

CERTIFICATE OF FILING

I certify that, I directed the PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition #9) to be electronically filed with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system pursuant to ORAP 16 on May 7, 2013.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition #9) upon the following individuals on May 7, 2013, by delivering a true, full and exact copy thereof via U.S. Mail to:

Douglas F. Zier OSB 804174
Department of Justice
1162 Court St. NE
Salem, OR 97310-4096
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and upon the following individual via facsimile transmission:

Kate Brown, Secretary of State
Elections Division
255 Capitol St. NE, Ste 501
Salem, Oregon 97310-0722
Fax: 1-503-373-7414

DATED this 7th day of May, 2013.

BENNETT, HARTMAN, MORRIS & KAPLAN, LLP

*s/*Margaret S. Olney
Margaret S. Olney, OSB 881359
of Attorneys for Petitioners