IN THE SUPREME COURT OF THE STATE OF OREGON

CYNTHIA KENDOLL, Petitioner, v. **ELLEN F. ROSENBLUM,** Attorney General, State of Oregon Respondent.	Case No. PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL Initiative Petition 52 (2016)

BALLOT TITLE CERTIFIED
October 29, 2015
Initiative Petition 52
Chief Petitioners: Sal Esquivel, James Ludwick, Mike Nearman

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Of Attorneys for Respondent

I. PETITION TO REVIEW BALLOT TITLE

Petitioner Cynthia Kendoll is an elector of this State, a person dissatisfied with the ballot title that is the subject of this action, and adversely affected by Respondent's actions. Petitioner timely submitted written comments concerning the draft ballot title and has standing to seek review pursuant to ORS 250.085(2).[1]

II. ARGUMENTS AND AUTHORITIES

A. Introduction

IP 52 would require employers to use E-verify. Specifically, employers who employ five or more employees would be required to use E-verify to confirm that new employees' citizenship and immigration status authorizes them to work in the United States. Pursuant to the measure, the legal presence of employees determines whether they are authorized for "employment," defined as "any service or labor performed by an employee for an employer *within the United States.*" Section 2(c) (emphasis added). The measure defines "verify the employment authorization," as determining "whether a newly hired employee is authorized to be employed in the United Sates pursuant to 8 U.S.C. § 1324a." Section 2(h). 8 U.S.C. § 1324a is a federal law entitled "Unlawful Employment of Aliens" that requires employers to verify the legal presence of employees. *Id.*

An actual major effect of IP 52 is to require Oregon employers to use E-verify to determine an employee's legal presence for employment purposes. The E-verify program is an online program administered by the Social Security Administration ("SSA") and the U.S.

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[1] A copy of IP 52 is attached as Exhibit 1; the draft ballot title is attached as Exhibit 2; Petitioner's 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.

Department of Homeland Security ("Homeland Security"). It verifies legal presence and employment eligibility by comparing information provided by employees to data available to SSA and Homeland Security, such as passport information, visas, immigration records, and social security numbers. If the information submitted to E-verify matches SSA's and Homeland Security's data, the employer will within seconds of online submission receive a message of "Employment Authorized." If the information does not match, the employer receives a "Tentative Nonconfirmation" message. In Fiscal Year 2014, 98.8% of all employees whose information was submitted to E-verify were instantly confirmed as "Employment Authorized" and only 1.2% received a "Tentative Nonconfirmation." http://www.uscis.gov/e-verify/about-program/performance.

Pursuant to IP 52, employees who receive "Tentative Nonconfirmation" may contest that result, during which time employers are prohibited from terminating or taking any adverse employment action against the employee. IP 52 would be enforced through a licensing system, pursuant to which all employers will be imputed an employment license. To maintain its employment license, an employer must use E-verify to confirm the employment authorization of new employees within three business days of the hiring date. Employers who fail to do so will be put on probation for one year, during which time the employer must demonstrate compliance. Subsequent violations result in a suspension of the employer's license for at least 30 days but not more than one year. Significantly, the measure does not apply to those engaged in casual domestic employment in private homes. Section 2(c).

B. The Ballot Title

This ballot title contains two fundamental flaws that run throughout all sections of the ballot title. First, there is no mention of the measure's primary subject matter: legal

authorization to be employed in the United States based on citizenship or immigration status. The ballot title does not inform voters that the measure pertains to the legal presence of employees. As such, voters could just as easily believe that the "employment authorization" discussed in the measure refers to age requirements or professional licensure. Second, the ballot title is misleading by incorrectly implying that current Oregon law requires employers to confirm employees' legal presence.

1. The Caption

ORS 250.035(2)(a) requires a ballot title to contain "[a] caption of not more than 15 words that reasonably identifies the subject matter of the state measure." As the "headline" for the ballot title, the caption "provides the context for the reader's consideration of the other information in the ballot title." *Mabon v. Myers*, 332 Or 633, 33 P3d 988, 990 (2001) (citing *Greene v. Kulongoski*, 322 Or 169, 175, 903 P2d 366 (1995)). A caption complies substantially with the requirements of ORS 250.035(2)(a) if it identifies the subject matter of the proposed measure in terms that will not confuse or mislead potential petition signers and voters. *Id.* A caption that catalogues the effects of a proposed measure, without identifying its subject matter, is inadequate. *Id.* (citing *Carson v. Myers*, 326 Or 248, 254, 951 P2d 700 (1998)). Similarly a caption that is underinclusive, because it fails to inform voters of all the major effects of an initiative, is statutorily noncompliant. *Towers v. Myers*, 341 Or 357, 362, 142 P3d 1040 (2006).

a. The caption does not alert voters that IP 52's subject matter is verification of employees' legal presence.

The caption for IP 52 does not substantially comply with statutory standards because it does not reasonably identify the subject matter of the measure and it is underinclusive. As discussed above, Respondent does not alert voters that this measure is about eligibility to work based on legal presence in the United States. The caption focuses on the "employment license"

and "employment authorization," but voters are given no context for this information. In other words, voters do not know that:

- *Legal presence* alone determines "employment authorization;"
- *Legal presence* is the sole focus of the "specified federal program;" or
- Verification of *legal presence* is required to maintain an "employment license."

Without any context, voters will mistakenly believe IP 52 is simply about whether employers should be required to have another type of license or use a "specified federal program." Information regarding an employment license and a federal program are essentially meaningless and Oregonians will not understand what they are actually voting on unless the information is put in the "legal presence context." Voters who tend to oppose additional regulation of employers are likely to oppose the measure, unless they know the actual effect of the measure is to require verification of employees' legal presence. Similarly, voters who tend to support the regulation of businesses are likely to support IP 52, but perhaps not if they know it would result in denying employment to those lacking legal presence. Regardless of the merits of these, and other, political positons, voters need to understand what is meant by "employment authorization." Indeed, "employment authorization" could refer to other employment requirements, such as professional licensure requirements or the legally required minimum age for employment. As drafted, the caption gives voters no indication that IP 52 is about preventing the employment of persons who are not legally present in the United States, although the measure is clearly about this.

Petitioner raised the above insufficiency in her comments and Respondent dismissed the comment stating, "Here, the measure creates a new 'employment license' for all Oregon employers, requires the license to employ any person, and conditions that license on

verifying new employees' authorization. The creation of the employment license is a major effect and so must be included in the caption." Exhibit 4 at 2. This response is inadequate because it is incomplete. The measure does not simply condition the license on verifying new employees' authorization; the measure conditions the license on verifying new employees' authorization *based on legal presence*. Respondent's failure to fully capture the subject of the measure renders it underinclusive. *See Eaton v. Keisling*, 311 Or 415, 419, 813 P.2d 37 (1991) (finding the caption did not fully capture the subject of the measure). *See also Sizemore v. Myers/Terhune*, 342 Or 578, 583, 157 P3d 188 (2007) (finding the caption likely would mislead petition signers because "[n]o other word or phrase in the caption adequately communicates the true scope of the proposed measure's subject matter"). At the very least, the requirement for employers to use E-verify to confirm legal presence is one of the major effects of the measure that should be identified in the caption. *See Lavey v. Kroger*, 350 Or 559, 563, 258 P3d 1194 (2011) (The subject matter of a measure 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.) "

b. The caption's use of "specified federal program" is confusing and uninformative.

The caption states that the measure requires "using specified federal program for employment authorization;" however, this is confusing and provides no meaningful information to voters because the federal government has a plethora of programs. In order to impart meaningful information to the voter, the caption should use the word "E-verify" because it is concise, clear, and many voters are familiar with E-verify as a way to check the citizenship and immigration status of employees. Additionally, the measure specifically refers to E-verify as the specific program employers would be required to use if IP 52 passes. "E-verify" is the definition of "employment authorization program" and it is a well-known program related to the subject

matter of IP 52 - verification of an employee's legal presence. Conversely, the terms "employment authorization program" and "specified federal program for employment authorization" have no recognized meaning outside IP 52. Similarly, in *Rooney v. Kulongoski*, 322 Or 15, 34, 902 P2d 1143 (1995), the Court rejected the use of use of the term "minority status" in a caption, stating that the concept "has no recognized meaning outside of this measure." Instead, the Court approved of the phrase "civil rights" because it was a term of common parlance that was utilized by the measure to define "minority status." For the same reasons, "E-verify" should be used rather than "employment authorization program."

For these foregoing reasons, Petitioner respectfully requests the Court to require modification of the caption.

2. The Results Statements

ORS 250.035(2) (b) requires a ballot title to contain "[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is approved." The statement must inform voters of the "outcome that is the most significant and immediate, or that carries the greatest consequence, for the general public." *Novick v. Myers,* 337 Or 568, 574 (2004). The "yes" statement does not comply with statutory requirements for the same reasons the caption is noncompliant: it fails to convey to voters the actual major effect of requiring employers to verify the legal presence of employees via E-verify and it uses the unclear term "federal program" rather than "E-verify."

ORS 250.035(2)(c) requires that a ballot title contain a "simple and understandable statement," of not more than 25 words, explaining what will happen if voters reject the measure.

a. The "no" vote result statement inaccurately implies that current Oregon law requires employers to confirm "employment authorization using

documentation."

Oregon law does not require employers to confirm their employees' legal presence; only federal law does so. By stating "current law requires employer to confirm employee's employment authorization using documentation," Respondent has misrepresented federal law as state law. The "no" statement is also confusing because in one section "current law" refers to federal law, and in the following section "current law" refers to state law. Impermissibly interchanging and conflating federal law and state law will confuse voters regarding the state of affairs regarding Oregon law and, consequently, the effect of a "no" vote. *See Greenberg v. Myers*, 340 Or 65, 127 P3d 1192, 1197 (2006) (Court "must consider the *Oregon law* that currently applies to the subject of the measure and then determine whether the Attorney General has summarized that law accurately.") (emphasis added). Here, Respondent has not accurately described state law.

Additionally, this Court requires that ballot title language must clarify when a ballot title refers to federal law and when it refers to state law. *Caruthers/Syrett v. Kroger*, 347 Or 411, 222 Pd 706 (2009) is instructive because the measure at issue there also pertained to immigration and its ballot title distinguished federal law from state law. The Court ultimately certified a "no" statement that provided, "No" vote retains current state/local limits on cooperation and resources to enforce federal immigration laws . . . ." Exhibit 6. Similarly, in *Starrett v. Myers*, 330 Or 139, 998 P2d 671 (2000), the Court modified the "no" statement to "clarify for the voters that they are making a choice as to Oregon law only" and not federal law. *Id.* at 673 ("'No' vote rejects expanding current Oregon background-check."). *See also Fidanque v. Myers*, 342 Or 485, 488, 155 P3d 867 (2007) ("No" vote statement limited to describing only current state law although both state and federal law implicated by measure.).

Because Respondent improperly refers to federal law as "current law," the "no" result statement does not correctly describe the effect of a "no" vote. The statement tells voters that a "no" vote maintains current (federal) law. However, a "yes" vote also maintains current (federal) law. Indeed, federal law is unaffected by a "yes" or "no" vote. However, the ballot title incorrectly implies that a "yes" vote would eliminate the federal requirement to verify an employee's legal presence. To correct this inaccuracy and confusion, the ballot title should inform voters that a "no" vote maintains current state law that does not require employers to verify new employees' authorization to be employed in the United States based on legal presence via E-verify.

3. The Summary

A ballot title's summary must be a "concise and impartial statement of not more than 125 words summarizing the state measure and its major effect." ORS 250.035(2)(d). IP 52's summary fails to put the measure in its "legal presence context" and identify the major effect of requiring employers to verify employees' citizenship or immigration status, as discussed above. The summary inappropriately uses an unclear term - "internet-based federal program" - to describe "E-verify." Also, similar to the "no" statement, the summary inaccurately implies that existing state law requires verification of employment authorization. As discussed above, ballot titles may not conflate state and federal law, but must distinguish between them so voters understand the impact of the proposed state measure. *See Carson v. Kroger*, 351 Or 508, 512, 270 P3d 243 (2012) (summary distinguished between state constitutional right and federal constitutional right); *Frazzini v. Myers*, 344 Or 648, 657, 189 P3d 1227 (2008) (summary stated "Domestic partnership law applies only within Oregon and does not change or confer rights under federal law."); *Fidanque*, 342 Or at 488 (summary distinguished between state law and

federal law), *Hunnicutt v. Myers*, 333 Or 508, 41 P3d 1084, 1084 (2002) (same).

Additionally, the summary inappropriately includes the unsupported and extraneous statement, "'Nonconfirmation' can result from employee ineligibility/incorrect information." It is unclear where this information comes from or whether it is accurate. Moreover, it is not impartial, as required by ORS 250.035(2)(d), because it overemphasizes and thus distorts the likelihood that an employee will receive a "nonconfirmation." As such, to be accurate, any reference regarding what might cause an employee to receive a "nonconfirmation" must include the fact that approximately 99% of all employees whose information is submitted to E-verify are instantly confirmed as "Employment Authorized" and only 1% of employees receive a "Tentative Nonconfirmation." http://www.uscis.gov/e-verify/about-program/performance. Finally, voters need to be informed that the measure does not apply to certain "casual employment by individuals who provide domestic service in a private home." Section 2(c). This is an important exception and limitation to the measure that should be reflected in the summary.

III. CONCLUSION

Based upon the foregoing, Petitioner respectfully requests that this Court declare that the certified ballot title does not substantially comply with ORS 250.035 and refer the ballot title back to the Attorney General for modification.

DATED this 13th day of November, 2015.

Respectfully submitted,

Jill Gibson, OSB #973581
GIBSON LAW FIRM, LLC
Of Attorneys for Petitioner

CERTIFICATE OF FILING

I hereby certify that I electronically filed the PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition 52) with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system pursuant to ORAP 16 on November 13, 2015.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition 52) upon the following individuals on November 13, 2015, by delivering a true, full and exact copy thereof via U.S. Mail to:

Shannon T. Reel, OSB #053948
Assistant Attorney General
Department of Justice
1162 Court St., NE
Salem, OR 97301-4096

Sal Esquivel
11 Corning Ct.
Medford, OR 97504

James Ludwick
7500 SW Lebold Rd.
McMinnville, OR 97128

Mike Nearman
2570 Greenwood Rd. S.
Independence, OR 97351

And upon the following individual via email (irrlistnotifier@sos.state.or.us):

Jeanne Atkins, Secretary of State
Elections Division
255 Capitol St. NE, Ste. 501
Salem, OR 97310-0722
Fax: (503) 373-7414

DATED this 13th day of November, 2015.

GIBSON LAW FIRM, LLC

Jill Gibson, OSB # 973581
Of Attorneys for Petitioner

SECTION 1. This chapter shall be known as the "Oregon Employment Protection Act."

SECTION 2. For the purpose of this Act only, the following words shall have the meanings ascribed herein unless the content clearly states otherwise:

(a) "Employee" means an individual who provides services or labor for an employer for wages or other remuneration but does not mean independent contractors as defined in this section or those engaged in casual domestic employment.

(b) "Employer" means a person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee to be performed in the United States for wages or other remuneration. In the case of an independent contractor or contract labor or services, the term employer shall mean the independent contractor or contractor and not the person or entity using the contract labor.

(c) "Employment" means any service or labor performed by an employee for an employer within the United States, including service or labor performed on a vessel or aircraft that has arrived in the United States and has been inspected, or otherwise included within the provisions of the Anti-Reflagging Act codified at 46 U.S.C. 8704, but not including duties performed by nonimmigrant crewmen defined in sections 101 (a)(10) and (a)(15) (D) of the Act. However, employment does not include casual employment by individuals who provide domestic service in a private home that is sporadic, irregular or intermittent.

(d) "Employment authorization program" means the E-verify Program (formerly the "Basic Pilot Program") under Pub. L. No. 104-208, Div. C, title IV, Subtitle A, 110 Stat. 3009-655 (Sept. 30, 1996), as amended, or any successor program designated by the federal government to verify the employment authorization of an employee.

(e) "Expenses related to the employment" means wages paid to an employee, including elective payments into a Simplified Employee Pension (IRC 3121(a)(5)(C)) or an annuity contract (IRC 3121(a)(5)(D)); contributions (IRC 3121(v)(1)(A)) to a 401k retirement plan; employee contributions under IRC 3121(v)(3)(A) and employer contributions under IRC 3121(a)(5)(E) to a government deferred compensation plan, including contributions "picked up" by a governmental unit (IRC 3121(v)(1)(B)) (and contributions to a nonqualified plan, a Section 457 plan, or a 403(b) annuity).

(f) "Independent contractor" means individuals or entities who carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results. Whether an individual or entity is an independent contractor, regardless of what the individual or entity calls itself, will be determined on a case-by-case basis. Factors to be considered in that determination include, but are not limited to, whether the individual or entity: supplies the tools or materials; makes services

available to the general public; works for a number of clients at the same time; has an opportunity for profit or loss as a result of labor or services provided; invests in the facilities for work; directs the order or sequence in which the work is to be done and determines the hours during which the work is to be done.

(g) "License" means any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency or political subdivision of this state for the purpose of operating a business in this state, excluding professional licenses, but including employment licenses, articles of organization, articles of incorporation, a certificate of partnership, a partnership registration, a certificate to transact business, or similar forms of authorization, and any transaction privilege tax license.

(h) "Verify the employment authorization" means to use a federal government employment authorization program to determine whether a newly hired employee is authorized to be employed in the United States pursuant to 8 U.S.C. § 1324a.

SECTION 3. (a) All employers in Oregon shall be imputed an Oregon employment license, which permits a private employer to employ a person in this state. An employer may not employ a person unless the private employer's Oregon employment license and any other applicable licenses as defined in Section 2, Subsection (g) are in effect and are not suspended or revoked. An employer's employment license shall remain in effect provided the employer complies with the provisions of this chapter.

(b) An employer who is required by federal law to complete and maintain federal employment eligibility verification forms or documents must register and participate in federal government's employment authorization program to verify the work authorization of every new employee within three business days after employing a new employee.

(c) An employer employing five or more employees shall provisionally employ a new employee until the new employee's work authorization has been verified pursuant to this section. Such employer shall submit a new employee's name and information for verification even if the new employee's employment is terminated less than three business days after becoming employed. If a new employee's work authorization is not verified by the employment authorization program, an employer must not employ, continue to employ, or reemploy the new employee. An employee may contest a "Tentative Nonconfirmation" result or other interim case result with the federal government, during which time an employer may not terminate the employment of the employee or take any adverse employment action against the employee because the employee received a "Tentative Nonconfirmation" or other interim case result.

(d) Every employer employing five or more employees shall keep a record of an employee's authorization to be employed in the United States pursuant to this Act for the duration of the employee's employment or at least three years, whichever is longer.

SECTION 4. An employer who does not comply with the requirements of this Act violates the employer's license. If an employer employing five or more employees fails to verify the employment authorization of a newly hired employee within the prescribed time period:

(a) For a first occurrence, the Secretary of State must place the employer on probation for a period of one year, during which time the employer must submit quarterly reports demonstrating compliance with this Act.

(b) For a subsequent violation, the Secretary of State shall suspend the employer's license for at least thirty (30) days but not more than one (1) year.

SECTION 5. Employer Compliance and Assistance by the State. (a) To assist employers in understanding the requirements of this chapter, the Secretary of State shall publish a notice containing said requirements on its website. Nothing in this section shall create a legal requirement that any employer receive actual notice of the requirements of this chapter through written notice from the Secretary of State, nor create any legal defense for failure to receive notice.

(b) The Oregon Employment Department shall provide employers with technical advice and electronic access to the employment authorization program's website for the sole purpose of registering and participating in the program.

(c) The Secretary of State shall submit a report of each investigation for which a penalty has been imposed pursuant to Section 4 of this Act to United States Immigration and Customs Enforcement.

SECTION 6. This provision shall be implemented in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons, and respecting the privileges and immunities of United States citizens.

SECTION 7. If any provision of this Act, or the applicability of any provision to any person or circumstance, shall be held to be invalid by a court of competent jurisdiction, the remainder of this Act shall not be affected and shall be given effect to the fullest extent practicable.

SECTION 8. Records created in connection to administrative investigations related to this Act are not subject to the exemptions in the Oregon Public Records Law at O.R.S. 192.410 et seq.

SECTION 9. All provision of this Act, with the exception of Section 5, Subsection (a), shall be effective on January 01, 2018. Section 5, Subsection (a) shall be effective on January 01, 2017.

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: September 30, 2015

SUBJECT: Initiative Petition **2016-052** Draft Ballot Title

The Elections Division received a draft ballot title from the Attorney General on September 30, 2015, for Initiative Petition **2016-052**, proposed for the November 8, 2016, General Election.

Caption

Requires "employment license" for employers; conditions license on using specified federal program for employment authorization

Chief Petitioners

Sal Esquivel	11 Corning Ct Medford, OR 97504
James Ludwick	7500 SW Lebold Rd McMinnville, OR 97128
Mike Nearman	2570 Greenwood Rd S Independence, OR 97351

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
October 14, 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

September 30, 2015

RECEIVED
2015 SEP 30 PM 4 42
SECRETARY OF STATE

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

Re: Proposed Initiative Petition — Requires "Employment License" for Employers; Conditions License on Using Specified Federal Program for Employment Authorization
DOJ File #BT-52-15; Elections Division #2016-052

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 requiring an "employment license" for employers, and conditions said license on using a specified federal program for employment authorization.

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/6822576

Enclosure

Sal Esquivel
11 Corning Ct.
Medford, OR 97504

James Ludwick
7500 SW Lebold Rd.
McMinnville, OR 97128

Mike Nearman
2570 Greenwood Rd. S.
Independence, OR 97351

DRAFT BALLOT TITLE

Requires "employment license" for employers; conditions license on using specified federal program for employment authorization

Result of "Yes" Vote: "Yes" vote "imputes" (undefined) "employment license" to employers; license required to employ any person. License requires verifying new employee's employment authorization using specified federal program.

Result of "No" Vote: "No" vote maintains current law requiring employer to confirm employee's employment authorization without using specified federal program.

Summary: Existing law requires employers to confirm employee's employment authorization; can use Form I-9. Measure "imputes" "employment license" to all employers. Requires employers with five or more employees to verify new employee's employment authorization using internet-based federal program/successor program. Prohibits employing any person if employer's "employment license" or other "license" (defined) suspended/revoked. Penalties for noncompliance include suspension of all "licenses" by Secretary of State, prohibiting employment of any person. Required federal program indicates employment is "authorized" or issues "nonconfirmation." "Nonconfirmation" can result from employee ineligibility or incorrect information. Employee may appeal "nonconfirmation;" adverse employment action prohibited during appeal. Oregon Employment Department shall provide technical advice, access to federal program. Secretary of State shall report penalties to federal immigration authorities. Exceptions. Other terms.

GIBSON
LAW FIRM

October 14, 2015

VIA EMAIL – irrlistnotifier@sos.state.or.us

The Honorable Jeanne Atkins
Secretary of State
Elections Division
255 Capitol Street NE, Ste. 501
Salem, OR 97310-0722

Re: Public Comment on Initiative Petition 52 (2016)

Dear Secretary Atkins,

I represent Cynthia Kendoll, an elector in the State of Oregon who wishes to comment on the draft ballot title for IP 52 (2016). Thank you for the opportunity to provide comments.

I. INTRODUCTION

IP 52 would require employers to verify that their new employees are legally authorized to work in the United States. Specifically, private employers who employ five or more employees would be required to verify that their new employees are authorized to work in the United States by using E-Verify. The E-verify program is a web-based system administered by the Social Security Administration ("SSA") and the U.S. Department of Homeland Security ("Homeland Security"). It confirms employment eligibility by comparing information provided by an employee on their Form I-9 to data available to SSA and Homeland Security, such as passport information, visas, immigration records, and social security numbers. If the information submitted to E-verify matches, the employer will almost immediately receive a message of "Employment Authorized." If the information does not match, the employer receives a "Tentative Nonconfirmation" message.[1]

Pursuant to IP 52, employees who receive "Tentative Nonconfirmation" may contest that result, during which time employers are prohibited from terminating or taking any adverse employment action against the employee until the matter is resolved. IP 52 would be enforced through a licensing system, in which all private employers must possess and will be imputed an employment license. To maintain its employment license, which is required to employ an employee, employers must comply with the measure and use E-verify to confirm employment

[1] In Fiscal Year 2014, 98.8% of all employees whose information was submitted to E-verify were confirmed as "Employment Authorized" and only 1.2% received a "Tentative Nonconfirmation." http://www.uscis.gov/e-verify/about-program/performance. Of the 1.2% who were not confirmed as employment eligible, .19% were confirmed as work authorized after contesting and resolving the mismatch and 1.04% were not found authorized for work. *Id.*

authorization of new employees within three business days of the hiring date. Employers who fail to do so will be put on probation for one year, during which time the employer must submit quarterly reports demonstrating compliance. For a subsequent violation, the employer's license will be suspended for at least 30 days but not more than one year.

II. DRAFT BALLOT TITLE

The Attorney General has proposed the following ballot title for IP 52:

Requires "employment license" for employers; conditions license on using specified federal program for employment authorization

Result of "Yes" Vote: "Yes" vote "imputes" (undefined) "employment license" to employers; license required to employ any person. License requires verifying new employee's employment authorization using specified federal program.

Result of "No" Vote: "No" vote maintains current law requiring employer to confirm employee's employment authorization without using specified federal program.

Summary: Existing law requires employers to confirm employee's employment authorization; can use Form I-9. Measure "imputes" "employment license" to all employers. Requires employers with five or more employees to verify new employee's employment authorization using internet-based federal program/successor program. Prohibits employing any person if employer's "employment license" or other "license" (defined) suspended/revoked. Penalties for noncompliance include suspension of all "licenses" by Secretary of State, prohibiting employment of any person. Required federal program indicates employment is "authorized"" or issues "nonconfirmation." "Nonconfirmation" can result from employee ineligibility or incorrect information. Employee may appeal "nonconfirmation;" adverse employment action prohibited during appeal. Oregon Employment Department shall provide technical advice, access to federal program. Secretary of State shall report penalties to federal immigration authorities. Exceptions. Other terms.

III. COMMENTS ON THE DRAFT BALLOT TITLE

A. The Caption

ORS 250.035(2)(a) requires a ballot title to contain "[a] caption of not more than 15 words that reasonably identifies the subject matter of the state measure." The "subject matter" of a measure 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 P.3d 1194 (2011) (citation omitted). When the Attorney General chooses to describe a measure by listing the changes that the proposed measure would enact, some changes may be of "sufficient significance" that they must be included in the description. *See*

Brady/Berman v. Kroger, 347 Or 518, 523, 225 P.3d 36 (2009) (so concluding); *see also Greenberg v. Myers*, 340 Or 65, 69, 127 P.3d 1192 (2006) ("What the Attorney General cannot do is select and identify in a caption only one out of multiple subjects and thus understate the scope of the proposed measure's subject matter."). Similarly, a caption that is underinclusive, because it fails to inform voters of all the major effects of an initiative, is statutorily noncompliant. *Towers v. Myers*, 341 Or 357, 362, 142 P3d 1040 (2006).

IP 52's draft caption is underinclusive because it does not identify the measure's primary subject matter: requiring employers to verify a new employee's legal authorization to be employed in the United States. The measure specifically defines "employment" as "any service or labor performed by an employee for an employer within the United States," Section 2(c), and the actual major effect is requiring employers to verify that an employee's citizenship and immigration status authorizes "employment." Instead of identifying the primary subject matter, the draft caption inappropriately focuses on the "employment license." Although a licensing system is the enforcement mechanism used by the measure to ensure compliance, it is not the primary subject matter and does not alert voters that this measure is about eligibility to work based on legal presence in the United States. Therefore, reference to the license should be included in the "yes" vote result statement instead of the caption.

The draft caption states that the measure requires "using specified federal program for employment authorization;" however, this does not inform voters that an employee's citizenship and immigration status is the focus of the employment authorization. Indeed, "employment authorization" could refer to other requirements of employment, such as professional licensure or the legally required minimum age. Our suggested caption (below) includes the phrase "authorization to work in the United States" to clarify for voters that the subject of IP 52 is authorization to work based on citizenship or immigration status. Also, the draft caption's reference to "specified federal program" is confusing because the federal government has a plethora of programs. In order to impart meaningful information to the voter, we suggest using the word "E-verify" because it is clear, accurate, and many voters are familiar with E-verify as a way to check citizenship and immigration status.

To address these insufficiencies, we propose the following caption:

Requires employers to verify new employees' authorization to work in United States using E-Verify program

B. The Result of "Yes" Vote Statement

ORS 250.035(2)(b) requires that a ballot title contain a "simple and understandable statement," of not more than 25 words, explaining what will happen if the measure is approved. As the Oregon Supreme Court has observed, the "yes" vote result statement should describe "the most significant and immediate" effects of the ballot initiative for "the general public." *Novick/Crew v. Myers*, 337 Or 568, 574, 100 P.3d 1064 (2004).

For convenience, we will restate the "yes" vote result statement proposed by the Attorney General:

Result of "Yes" Vote: "Yes" vote "imputes" (undefined) "employment license" to employers; license required to employ any person. License requires verifying new employee's employment authorization using specified federal program.

This "yes" vote result statement suffers from the same deficiencies as the caption because it fails to alert voters that the measure's subject matter is verification of an employee's authorization to work in the United States. Additionally, the use of quotation marks around "imputes" followed by "(undefined)" is confusing, unnecessary, and inaccurately implies that the word is used in a manner that is unclear or different than its normal definition. *See, e.g., Hunnicutt v. Myers*, 342 Or. 491, 495-96, 155 P.3d 870 (2007) (rejecting argument that term from measure used in ballot title should be identified as "undefined" because meaning of word, "in context, is sufficiently clear that no signal . . . is necessary to achieve substantial compliance with statutory standards"). "Impute" means "to attribute accusingly" or "to credit or ascribe to a person or a cause." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993). IP 52 requires employers to have an employment license, but rather than requiring a state agency to actually issue licenses to every employer upon passage of the measure, the measures states, "All employers in Oregon shall be imputed an Oregon employment license, which permits a private employer to employ a person in this state." Section 3(a). As used in the measure, it is clear that "imputes" means that employment licenses will be attributed to employers. Because IP 52 uses the word "impute" in its ordinary meaning, it should not be put inside quotation marks and labeled "undefined."

To address these insufficiencies, we propose:

Result of "Yes" Vote: "Yes" vote requires employers to use federal E-Verify program to verify new employees' authorization to work in United States in order to maintain employment license.

C. The Result of "No' Vote Statement

ORS 250.035(2)(c) requires that a ballot title contain a "simple and understandable statement," of not more than 25 words, explaining what will happen if voters reject the measure. This means that the statement must explain to voters "the state of affairs" that will exist if the initiative is rejected, i.e. the status quo. Also, a "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." *Novick/Crew* at 577, 100 P.3d 1064 (emphasis in original).

In addition to containing the insufficiencies noted above, the "no" result statement is inaccurate and misleading because it states that current law "requires" employers to confirm

employees' employment authorization. The results statements must address *state* law, not federal law, and there is no current state law requiring verification of employment authorization. The federal government makes it unlawful to hire unauthorized persons, 8 U.S.C. § 1324a, but doing so does not violate any state law. The draft "no" result statement will mislead voters to mistakenly believe that Oregon law currently requires employers to verify an employee's citizenship or immigration status. Additionally, contrary to the "no" result statement, Oregon law does not require employers to confirm employment authorization "without using specified federal program." This language is confusing and implies that state law prohibits using E-verify or another federal program when confirming employment authorization, which is not the case.

To accurately describe the status quo, please consider the following:

Result of "No" Vote: "No" vote maintains current state law not requiring employers to verify new employees' legal authorization to be employed in the United States.

D. The Summary

ORS 250.035(2)(d) requires that a ballot title contain a "concise and impartial statement of not more than 125 words summarizing the state measure and its major effects." The purpose of a ballot title's summary is to give voters enough information to understand what will happen if the initiative is adopted. *See Whitsett v. Kroger*, 348 Or 243, 252, 230 P.3d 545 (2010).

The summary adequately describes several elements of IP 52; however, it contains a few deficiencies that need to be corrected. For convenience, I have underlined the language we find noncompliant in the Attorney General's draft summary:

> **Summary:** Existing law requires employers to confirm employee's employment authorization; can use Form I-9. Measure "imputes" "employment license" to all employers. Requires employers with five or more employees to verify new employee's employment authorization using internet-based federal program/successor program. Prohibits employing any person if employer's "employment license" or other "license" (defined) suspended/revoked. Penalties for noncompliance include suspension of all "licenses" by Secretary of State, prohibiting employment of any person. Required federal program indicates employment is "authorized"" or issues "nonconfirmation." "Nonconfirmation" can result from employee ineligibility or incorrect information. Employee may appeal "nonconfirmation;" adverse employment action prohibited during appeal. Oregon Employment Department shall provide technical advice, access to federal program. Secretary of State shall report penalties to federal immigration authorities. Exceptions. Other terms.

As an initial matter, the summary does not identify for voters that the actual major effect of the measure is to require employers to verify new employees' legal authorization to work in

the United States based on citizenship and immigration status. Additionally, as discussed previously, the draft summary inaccurately implies that *state* law requires verification of employment authorization.

Putting quotation marks around "imputed" is confusing and unnecessary because the word should be given its plain English meaning. Implying that the word means something other than its ordinary meaning is pejorative and reflects negatively on the measure. Because ORS 250.035(2)(d) requires that the summary be impartial, the quotation marks should be removed. Similarly, the word "license" should not be put in quotation marks or followed by the word "(defined)" because it, also, is used in its ordinary meaning. Although the measure includes a definition, it does not differ from the common definition.

We believe references to "federal program/successor program" and "required federal program" should be replaced with "federal E-verify program" because it makes clear to voters which of the many federal programs the measures requires to be used. "Required federal program" does not give voters sufficient information and does not alert voters to the underlying issue: employment authorization based on citizenship and immigration status. Many voters are familiar with E-verify and know it verifies a person's authority to work in the United States based on legal presence.

The draft summary includes several inaccuracies. First, it states that penalties for noncompliance include suspension of "all 'licenses'"; however IP 52 states that an "employer's license" may be suspended. The measure clearly refers to suspension of the employment license only, not *all* licenses. Section 3(a) ("An employer's employment license shall remain in effect provided the employer complies with the provision of this chapter."). The draft summary also incorrectly states that employees may "appeal" nonconfirmation results; however, use of this word will cause voters to mistakenly believe that employees have to initiate legal action in court to challenge a "nonconfirmation" result. The measure does not require legal action to review such a result and we suggest using the word used in the measure: "contest." For the summary to be accurate and impartial, we also believe that voters need to be informed that the measure does not apply to certain domestic employment in private homes. Section 2(c).

Finally, the draft summary states, "'Nonconfirmation' can result from employee ineligibility or incorrect information." This sentence should be removed for several reasons. First, it is not impartial, as required by ORS 250.035(2)(d), because it overemphasizes and thus distorts the likelihood that a new employee will receive a "nonconfirmation" on the basis of a mistake. Furthermore, any reference to what may cause an employee to receive a "nonconfirmation" should be balanced with a statement regarding what causes an employee to be "authorized," such as when the employee's social security number or immigration status is verified. However, we believe it is best to not include either sentence because they go beyond the text of the measure and rely on extraneous information. ORS 250.035(2)(d) requires the summary to summarize the measure, and IP 52 contains no reference to "incorrect information"

resulting in a "nonconfirmation." The source of this information is unclear and its inclusion is improper.

To address these issues, we suggest the below summary:

Summary: Federal law requires employers to verify employees' legal authorization to work in United States based on citizenship and immigration status; allows states to require use of federal web-based E-Verify program to verify employment authorization. Measure requires and automatically imputes employment licenses to employers, requires employers with five or more employees to use E-Verify to confirm employment authorization for new employees. E-Verify program notifies employer whether employee is "authorized" to work or issues "nonconfirmation." Employee may contest "nonconfirmation," employers prohibited from taking adverse employment actions during contest. Measure does not apply to certain domestic employment in homes. Employment Department shall provide technical advice. Secretary of State shall report penalties to federal immigration authorities, for repeated violations may suspend employment license for thirty days to one year.

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

Very truly yours,

Jill Gibson

ELLEN F. ROSENBLUM
Attorney General

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DEPARTMENT OF JUSTICE
APPELLATE DIVISION

October 29, 2015

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

Re: Proposed Initiative Petition — "Imputes" "Employment License" to Employers; Conditions "License" on Using Specified Federal Program for Employment Authorization
DOJ File #BT-52-15; Elections Division #2016-052

Dear Mr. Williams:

We received comments on the Attorney General's draft ballot title for Initiative Petition 52 (2016) (IP 52) from Cynthia Kendoll (through counsel, Jill Gibson) and from David Rogers, Rev. Joseph Santos-Lyons, Kayse Jama, Andrea Miller, Bill Perry, and Jeff Stone (through counsel, Tim Cunningham). Both sets of commenters object to all parts of the draft 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.

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:

Requires "employment license" for employers; conditions license on using specified federal program for employment authorization

1. Comments from Ms. Kendoll

Ms. Kendoll contends that the caption fails to reasonably identify the primary subject matter of the proposed measure. She asserts that the "actual major effect is requiring employers to verify that an employee's citizenship and immigration status authorizes 'employment.'"

(Kendoll Letter 3). She asserts that the caption focuses on the enforcement mechanism for the proposed measure—the "employment license"—instead of the measure's primary effect. (*Id.*). Ms. Kendoll also contends that the phrase "using specified federal program for employment authorization" is unclear and confusing. She proposes the following caption: "Requires employers to verify new employees' authorization to work in United States using E-Verify program[.]" (*Id.*).

2. Comments from Mr. Rogers, Rev. Santos-Lyons, Mr. Jama, Ms. Miller, Mr. Perry, and Mr. Stone

Mr. Rogers, *et al.*, contend that the caption is flawed in three ways. First, they observe that the caption uses the term "requires" where the measure uses the term "imputes." They contend that "requires" is inaccurate because it "suggests that affirmative action is necessary on the part of a business of obtain a license," when the measure does not require any such action. (Rogers Letter 3). Second, they observe that the caption fails to identify the state as the governmental entity "from whom the 'employment license' will issue." (*Id.*). Third, they contend that the caption fails to address the penalties imposed by the proposed measure. (*Id.*). They propose the following caption: "'Imputes' new state 'employment license'; employing workers conditioned on employment authorization through federal program; penalties[.]" (*Id.* at 4)

3. Our Response to the Comments

After considering the comments, we agree that the caption should be revised.

Regarding Ms. Kendoll's comments, we disagree that the caption fails to describe the actual major effect of the proposed measure. We determine the "actual major effect" of a measure by considering the "changes that the proposed measure would enact in the context of existing law." *Rasmussen v. Kroger*, 350 Or. 281, 285, 253 P.3d 1031 (2011). Where a measure has multiple important effects, the caption cannot focus solely on one "highly generalized aspect" of the measure. *McCann v. Rosenblum*, 354 Or 701, 707, 320 P3d 548 (2014). Here, the measure creates a new "employment license" for all Oregon employers, requires the license to employ any person, and conditions that license on verifying new employees' authorization. The creation of the employment license is a major effect and so must be included in the caption.

We also disagree with Ms. Kendoll's suggestion that "specified federal program" is misleading and should be replaced with "E-Verify." The proposed measure uses the term "employment authorization program," which is defined as E-Verify or "any successor program." Section 2(d). Elsewhere the measure uses the term "federal government employment authorization program." Sections 2(h), 3(b). "Specified federal program" accurately reflects the text of the proposed measure.

Regarding comments from Mr. Rogers, *et al.*, we agree that "imputes" is more accurate than "requires." We also agree that the caption should notify voters that other licenses, in addition to the employment license, are implicated by the measure. We disagree that the caption

must identify the state as the licensing entity and include the word "penalties." Those details are adequately addressed in the modified "yes" result and summary, as discussed below.

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

"Imputes" "employment license" to employers; conditions "license" on using specified federal program for employment authorization

B. The "Yes" Vote Result Statement

We next consider the draft "yes" vote result statement. 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 "imputes" (undefined) "employment license" to employers; license required to employ any person. License requires verifying new employee's employment authorization using specified federal program.

1. Comments from Ms. Kendoll

Ms. Kendoll contends that the "yes" vote result statement fails to reasonably identify the subject matter of the proposed measure, which is the same objection she had regarding the caption. (Kendoll Letter 4). She also objects to the use of quotation marks around "imputes" and to the inclusion of "(undefined)" to modify "imputes." (*Id.*). She asserts that "impute" has its ordinary meaning and so should not be placed in quotation marks and labeled "undefined." (*Id.*) She proposes the following "yes" result statement: "'Yes' vote requires employers to use federal E-Verify program to verify new employees' authorization to work in United States in order to maintain employment license." (*Id.*).

2. Comments from Mr. Rogers, Rev. Santos-Lyons, Mr. Jama, Ms. Miller, Mr. Perry, and Mr. Stone

Mr. Rogers, *et al.*, contend that the "yes" result statement should inform voters that the state is the governmental entity "imputing" the employment license. (Rogers Letter 4). They contend that "impute" does not need to be modified by "(undefined)" because quotation marks are sufficient to alert voters that term is undefined. They note that "employer," "employment," and "employee" are defined by the measure and believe voters should be informed of that fact. (*Id.* at 5). Finally, they contend that the proposed "yes" result statement fails to describe significant new penalties imposed against employers "for failing to maintain administrative filings at all levels of government." (*Id.*). They propose the following result statement: "'Yes' vote 'imputes' new state 'employment license' to employers; employing workers conditioned on authorization through federal program; penalties include revoking ability to employ any employees." (*Id.*)

3. Our Response to the Comments

After considering the comments, we agree that the "yes" result statement should be revised.

We agree with Ms. Kendoll and with Mr. Rogers, *et al.*, that "impute" does not need to be modified by "(undefined)." We agree with Mr. Rogers, *et al.*, that the quotation marks around "impute" are sufficient to signal that the term is undefined.

We disagree with Ms. Kendoll that the quotation marks should be removed from "impute." "Impute" is not defined by the measure but the term denotes one of the measure's key effects. Although "impute" may carry its ordinary meaning, what it means for a license to be "imputed" is still unclear. Ms. Kendoll notes that "impute" means "to attribute accusingly" or "to credit or ascribe to a person or cause." Applying those definitions, it is not clear what "attributing," "crediting," or "ascribing" a license to a business means. We are unaware of any existing Oregon statute that "imputes" a license (or any other legal requirement) to a person or business. Additionally, the measure does not indicate what agency "imputes" the license to a business or describe any process for "imputing" a license. Based on those ambiguities, quotation marks around "impute" are appropriate. *See Morgan v. Meyers*, 342 Or 165, 149 P3d 1160 (2006) (requiring quotation marks around critical term that is undefined by the measure). We also disagree with Ms. Kendoll's assertion that the "yes" result statement focuses improperly on the license requirement, as discussed in our response regarding the caption.

Regarding the comments from Mr. Rogers, *et al.*, we agree that the "yes" result should notify voters that the measure has impacts on other "licenses." As defined in Section 2(g), "license" is broadly defined; under Sections 3(a) and 4(b), those "licenses" must be in effect for an employer to employ any person and those license may be revoked if an employer fails to confirm new employees authorization for employment using E-Verify. We disagree that the "yes" must identify the state as the entity imputing the license. That issue is adequately addressed in the summary.

In light of the comments concerning the draft "yes" result statement, we modify the statement as follows:

> **Result of "Yes" Vote:** "Yes" vote "imputes" "employment license" to employers; "license" (defined) required to employ any person. "License" conditioned on verifying new employee's employment authorization using federal program.

C. The "No" Vote Result Statement

We next consider the draft "no" vote result statement. 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)(c). 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 maintains current law requiring employer to confirm employee's employment authorization without using specified federal program.

1. Comments from Ms. Kendoll

Ms. Kendoll contends that the "no" vote statement is inaccurate and misleading because "the results statement must address *state* law, not federal law, and there is no current state law requiring verification of employment authorization." (Kendoll Letter 5). She proposes the following "no" result statement: "'No' vote maintains current state law not requiring employers to verify new employees' legal authorization to be employed in the United States."

2. Comments from Mr. Rogers, Rev. Santos-Lyons, Mr. Jama, Ms. Miller, Mr. Perry, and Mr. Stone

Mr. Rogers, *et al.*, contend that the "no" result statement does not adequately describe the current federal law—which requires an employer to confirm employment eligibility using certain documentation—in relation to the changes proposed by the measure. (Rogers Letter 5). They also contend that the "no" statement should clarify for voters that a "no" vote maintains "the status quo, whereby no state-imputed license is required in order to employ employees." (*Id.*). They propose the following: "'No' vote maintains current law requiring employer to confirm employee's identity and employment authorization with specified documentation; no additional state employment license needed to employ." (*Id.*).

3. Our Response to the Comments

After considering the comments, we agree that the "no" result statement should be revised.

We disagree with Ms. Kendoll that the "no" result statement may not address federal law. The "no" result statement must "address[] the substance of current law *on the subject matter of the proposed measure*." *Novick/Crew*, 337 Or at 577 (emphasis original). Here, federal law is the current law on the subject matter. Ms. Kendoll's proposed "no" statement is inaccurate because employers currently are required to verify employment authorization under federal law.

We agree with Mr. Rogers, *et al.*, that the "no" result statement could more accurately describe current law by informing voters that current law requires employers to confirm authorization using certain documentation. We also agree that the "no" result statement should reflect that use of E-Verify will not be required nor will a new license be created.

We modify the "no" result as follows:

> **Result of "No" Vote:** "No" vote maintains current law requiring employer to confirm employee's employment authorization using documentation; current law does not require "employment license" or using specified program.

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:** Existing law requires employers to confirm employee's employment authorization; can use Form I-9. Measure "imputes" "employment license" to all employers. Requires employers with five or more employees to verify new employee's employment authorization using internet-based federal program/successor program. Prohibits employing any person if employer's "employment license" or other "license" (defined) suspended/revoked. Penalties for noncompliance include suspension of all "licenses" by Secretary of State, prohibiting employment of any person. Required federal program indicates employment is "authorized" or issues "nonconfirmation." "Nonconfirmation" can result from employee ineligibility or incorrect information. Employee may appeal "nonconfirmation;" adverse employment action prohibited during appeal. Oregon Employment Department shall provide technical advice, access to federal program. Secretary of State shall report penalties to federal immigration authorities. Exceptions. Other terms.

1. Comments from Ms. Kendoll

Ms. Kendoll contends that the summary is deficient in the same ways the caption and result statements are deficient and that the summary fails to identify the actual major effect of the proposed measure. (Kendoll Letter 5-6). She would replace references to "federal program" with "federal E-Verify program." (*Id.* at 6). She also contends that the summary is inaccurate in several respects. First, she asserts that the proposed measure does not include the suspension of "all 'licenses'" as a penalty for noncompliance. (*Id.*) Second, she asserts that the word "appeal" is misleading because it suggests the involvement of a court and that "contest" is word used in the measure. Third, she asserts that voters should be informed that the measure does not apply to certain domestic employment in private homes. Finally, she objects that the draft's explanation of why a "nonconfirmation" can occur is not impartial. (*Id.* 6-7). Ms. Kendoll proposes a revised summary that she believes would address her concerns. (*Id.* at 7).

2. Comments from Mr. Rogers, Rev. Santos-Lyons, Mr. Jama, Ms. Miller, Mr. Perry, and Mr. Stone

Mr. Rogers, *et al.*, contend that the problems with the caption and result statements carry over into the summary. Specifically, they contend that the summary fails to describe the measure's major effects because the summary does not inform voters that current law does not require an employment license and because the summary does not note certain undefined terms in the measure. (Rogers Letter 7). They also assert that the summary should inform voter that the measure requires employers to register with the federal government to use the required program. They also contend that "appeal" should be replaced with "contest." Finally, they contend that the summary fails to note that the measure may apply to volunteers. (*Id.*). Mr. Rogers, *et al.*, propose a revised summary they believe would address their concerns. (*Id.* at 8).

3. Our Response to the Comments

After considering the comments, we agree that the summary should be revised.

We agree with Ms. Kendoll and Mr. Rogers, *et al.*, that the word "appeal" should be replaced with "contest," because "contest" is the term used in the measure. We agree with Mr. Rogers, *et al.*, that the summary should clarify that an employment license is not currently required by state law and that the license would be imputed by the state. We also agree with Mr. Rogers, *et al.*, that the summary should notify voters that employers will be required to register with the federal program.

Concerning Ms. Kendoll's comments, we disagree that the draft summary inaccurately describes the penalties for noncompliance. Section 4 provides that "An employer who does not comply with the requirements of the Act violates the employer's license." Section 4(a) places an employer on "probation" for a first violation of the measure. Section 4(b) provides that, "For a subsequent violation, the Secretary of State shall suspend the employer's license." Ms. Kendoll contends that the phrase "employer's license" refers only to the employer's "*employment* license" and not any other license an employer must possess. The measure, however, specifically defines "license" as "any agency permit, certificate, approval, registration, charter, or similar form of authorization that is required by law and that is issued by any agency or political subdivision of this state for the purpose of operating a business in this state[.]" Section 2(g). Based on the plain text of the measure, the phrase "employer's license" incorporates the broad definition of "license." We note that other parts of the measure use the phrase "employer's employment license" when referring to the specific employment license created by the measure, but Section 4 uses the broader phrase "employer's license" instead. *See* Section 3(a) ("An *employer's employment license* shall remain in effect provided the employer complies with the provisions of this chapter.") (Emphasis added).

We also disagree with Ms. Kendoll's objection to the explanation of "nonconfirmation." Section 3(c) notes that a "Tentative Nonconfirmation" is one possible result of submitting a new employee's name and information to the E-Verify program. The explanation for why a "nonconfirmation" could result provides important context and also explains why an employee would need to "contest" the result. We also disagree that the summary must describe the exception for casual domestic employment; other more important effects of the measure take priority for the limited space allotted for the summary.

Concerning the comments by Mr. Rogers, *et al.*, we disagree that the summary must state that the definition of employee may apply to volunteers. Although they may be correct regarding the application of the measure to volunteers, that is not a major effect of the measure and, in light of the other major effects that appear on the face of the measure and require explanation, does not need to be included in the summary.

In light of the comments, we modify the summary as follows:

Summary: Existing law requires employers to confirm employee's employment authorization; can use Form I-9. Measure "imputes" new state "employment license" to all employers. Requires employers with five or more employees to verify new employee authorization using internet-based federal program. Prohibits employing any person if employer's "employment license" or other "license" (defined) suspended/revoked. Penalties for noncompliance include suspension of all "licenses" by Secretary of State, prohibiting employment of any person. Required federal program indicates employment is "authorized" or issues "nonconfirmation." "Nonconfirmation" can result from employee ineligibility/ incorrect information. Employee may "contest" "nonconfirmation;" adverse employment action prohibited during contest. Employers must register with federal program; Oregon Employment Department shall provide technical advice, access. Secretary of State shall report penalties to federal immigration authorities. Exceptions. Other terms.

E. Conclusion

We certify the attached ballot title.

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Enclosure

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Certified by Attorney General on October 29, 2015.

BALLOT TITLE

"Imputes" "employment license" to employers; conditions "license" on using specified federal program for employment authorization

Result of "Yes" Vote: "Yes" vote "imputes" "employment license" to employers; "license" (defined) required to employ any person. "License" conditioned on verifying new employee's employment authorization using federal program.

Result of "No" Vote: "No" vote maintains current law requiring employer to confirm employee's employment authorization using documentation; current law does not require "employment license" or using specified program.

Summary: Existing law requires employers to confirm employee's employment authorization; can use Form I-9. Measure "imputes" new state "employment license" to all employers. Requires employers with five or more employees to verify new employee authorization using internet-based federal program. Prohibits employing any person if employer's "employment license" or other "license" (defined) suspended/revoked. Penalties for noncompliance include suspension of all "licenses" by Secretary of State, prohibiting employment of any person. Required federal program indicates employment is "authorized" or issues "nonconfirmation." "Nonconfirmation" can result from employee ineligibility/ incorrect information. Employee may "contest" "nonconfirmation;" adverse employment action prohibited during contest. Employers must register with federal program; Oregon Employment Department shall provide technical advice, access. Secretary of State shall report penalties to federal immigration authorities. Exceptions. Other terms.

EXHIBIT 5

Certified by Attorney General on January 4, 2010.

Assistant Attorney General

MODIFIED BALLOT TITLE

Bars laws limiting state/local cooperation with immigration enforcement; requires certain documentation for voter registration

Result of "Yes" Vote: "Yes" vote bars laws limiting state/local government's cooperation with federal immigration enforcement; voter registration requires specified citizenship documentation: driver license; birth certificate; passport; other.

Result of "No" Vote: "No" vote retains current state/local limits on cooperation and resources to enforce federal immigration laws; voter registration requirements: indication of citizenship; attestation of qualifications.

Summary: Current law prohibits expenditure of state/local law enforcement resources solely to enforce federal immigration laws; allows only United States citizens to vote, and requires Oregon voter registrants to attest to, but not to document, voter qualifications. Measure prohibits laws limiting government officials'/employees' cooperation with federal officials enforcing immigration law; requires first-time Oregon voter registrant to provide proof of citizenship consisting of any one of the following: an Oregon driver license/non-operating identification license issued after October 1, 1996 or from another state indicating that the person has provided proof of citizenship; birth certificate; United States passport; naturalization documents or confirmed number of naturalization certificate; other documents or method of proof established under federal immigration law; specified types of proof of tribal membership.

EXHIBIT 6