IN THE SUPREME COURT OF THE STATE OF OREGON

JILL GIBSON, Petitioner, v. ELLEN F. ROSENBLUM, Attorney General, State of Oregon Respondent.	Case No. S063356 (Control) PETITIONER JILL GIBSON'S REPLY TO RESPONDENT'S ANSWER Initiative Petition 2016-035 Ballot Title Certified on June 17, 2015
HANNA VAANDERING and BETHANNE DARBY, Petitioners, v. ELLEN F. ROSENBLUM, Attorney General, State of Oregon Respondent.	S063362
ERIC WINTERS, Petitioner, v. ELLEN F. ROSENBLUM, Attorney General, State of Oregon Respondent.	S063363

A. The Ballot Title Inaccurately Construes the Definition of "Collective Bargaining" as Amended by Initiative Petition 35.

The primary issue this Court must decide is whether IP 35 amends the definition of "collective bargaining." The answer to this question will determine the scope and effect of IP 35 because "collective bargaining" is the subject of the Oregon Public Employee Collective Bargaining Act ("PECBA") and its provisions (ORS 243.650 - 243.782) apply this definition throughout. A review of IP 35 clearly shows that it would amend "collective bargaining" to exclude nonmembers. Section 3(4) (Collective bargaining "means the performance of the mutual obligation of a public employer and the representatives of its employees **who have chosen to join a labor organization**. . . .") (emphasis in original). This fundamental change has dramatic legal ripple effects throughout PECBA, including changing employee units that are "appropriate for collective bargaining." Section 3(1). Pursuant to the plain text of the initiative, collective bargaining does not include nonmembers, thus determining that nonmembers are included in appropriate collective bargaining units is blatantly incorrect.

Nevertheless, the plain language of the initiative is ignored by Petitioner Hanna Vaandering ("Vaandering"), Petitioner Bethanne Darby ("Darby"), *Amicus Curiae* Heather Conroy ("Conroy"), and Respondent, (collectively "opposing parties"). For example, Vaandering and Darby state "Once an

employee is in the bargaining unit, it follows that he or she will receive all the wages, benefits and other terms of conditions of employment that the union negotiates on behalf of bargaining unit employees." Vaandering/Darby Petition at 2-3. All of their subsequent analysis is premised on the false statement that nonmembers are included in collective bargaining units pursuant to IP 35. The other opposing parties make the same error.

Opposing parties also incorrectly claim that this Court has repeatedly reviewed similar measures and required that the ballot titles identify a "free rider" effect. However, the cases[1] cited by opposing parties are inapposite because none of those cases involved a measure like IP 35 that would relieve unions of the requirement to represent nonmembers. The only measure reviewed by this Court that also relieved unions from representing nonmembers was in *Caruthers v. Myers*, 344 Or 596, 189 P3d 1 (2008), and the caption ultimately certified did not identify a "free rider effect" because it did not state that nonmembers would receive benefits for free.[2]

B. This Court and Respondent May Not Engage in Extensive Legal Interpretation and Adopt an Unsettled Interpretation of IP 35.

Respondent does not address Petitioner Gibson's ("Gibson") argument

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[1] *See, e.g. Towers v. Rosenblum*, 354 Or 125, 310 P3d 136 (2013); *Sizemore v. Meyers*, 342 Or 578, 157 P3d 188 (2007); *Dale v. Kulongoski*, 321 Or 108, 894 P2d 462 (1995); *Sizemore v. Kulongoski*, 319 Or 82, 873 P2d 314 (1994).

[2] Conroy accuses Gibson of being "flatly wrong" about this point; however, Gibson is correct that the *Caruthers* ballot title did not identify the "free rider" effect because it did not state that nonmembers would receive union representation or benefits.

that it is well settled that Respondent may not adopt a disputed interpretation of a measure. Conroy responds by accusing Gibson of "selectively quoting" *Crumpton v. Kulongoski*, 321 Or 269, 896 P2d 577 (1995) without informing the Court that the quoted language is from the dissent. Conroy Petition at 4, footnote 4. Gibson urges the Court to carefully review her quote from *Crumpton* because it accurately states the Court's position that "it is not the province of the Attorney General in discharging his duty to provide a title to make clear that which is not clear in the measure itself." *Id.*, 321 at 275, Justice Durham, *dissent*. Gibson does not selectively quote or misrepresent this Court's view that when there are two or more plausible interpretations of a proposed initiative, this Court declines to choose, or permit the Attorney General to choose, one of those interpretations for purposes of the ballot title. *Caruthers*, 344 Or at 602-03 (citing *Wolf v. Myers*, 343 Or 494, 501, 173 P3d 812 (2007)); S*izemore v. Myers*, 326 Or 220, 231, 953 P2d 360 (1997) (declining to require Attorney General to resolve ambiguity); *Kouns v. Paulus*, 296 Or 826, 828, 680 P2d 385 (1984) (it is not the Attorney General's function to interpret a proposed measure in preparing a ballot title). *Wolf* explains that while ballot title preparation requires "a certain amount of basic interpretation," "[w]hen it appears that more than one reading of the wording of a contested measure is plausible, our precedents are clear that it is inappropriate for this court, at this stage, to resolve such an ambiguity in the measure." *Id*. at 501

(citing *Christ/Tauman v. Myers*, 339 Or 494, 500, 123 P3d 271 (2005) and *Bartsch v. Kulongoski*, 322 Or 335, 339, 906 P2d 815 (1995).

This is a well settled area of the law and another reason why this Court should not entertain opposing parties' creative arguments that IP 35 allows "free riders." Opposing parties are asking this Court to answer a complex question of first impression: whether exempting nonmembers from paying union dues and exempting unions from representing those nonmembers results in "free riders." This Court did not address this issue in *Caruthers*, indeed has never addressed this issue. Additionally, this Court has already determined that the effect of a similar measure on public sector labor law is unclear and unresolved. *Caruthers* at 602. Thus, determining that IP 35 would allow "free riders" goes far beyond the limited interpretation allowed in ballot title litigation and is impermissible.

C. Employers Would Not be Required to Offer Nonmembers and Members the Same Employment Terms.

Opposing parties argue that offering different employment terms to nonmembers would be an unfair labor practice under ORS 243.672(1)(a). This argument is meritless and should be rejected by this Court. First, this Court would have to engage in extensive interpretation of a complex issue of first impression in order to agree with that argument, which is prohibited. Second, ORS 243.672(1)(a) does not make all "different" employment terms illegal; the issue is whether such terms are coercive. Offering different employment terms to nonmembers that are based on legitimate, nondiscriminatory reasons would not be an unfair labor practice. *See, e.g. Oregon Ass'n of Justice Attorneys v.*

Dep't of Justice,17 PECBR 102, 135 (1997); *Teamsters, Local 670 v. Rural Road Assessment Dist. #3*, 8 PECBR 6580, 6584 (1984).

Finally, opposing parties apply the "natural and probable effect" test in a manner that is hyper-technical, unsupported, and ultimately undercuts their own argument. They argue that IP 35 would require employers to offer nonmembers the same benefits as members because, allegedly, offering lower wages to nonmembers would illegally encourage union membership and offering higher wages to nonmembers would illegally discourage union membership. However, opposing parties fail to apply this rationale to the scenario in which the same employment terms are offered. Applying their own analysis, an employer who offered the same terms to nonmembers would also commit an unfair labor practice because it would discourage membership. The Court should reject adoption of a test that results in an unfair labor practice regardless of what an employer does.

CONCLUSION

The Court should certify to the Secretary of State a ballot title that complies with the requirements of ORS 250.035 or refer the ballot title back to Respondent with directions to omit any reference to "free riders."

DATED this 19th day of August, 2015.

Respectfully submitted,

/s/ Jill Gibson
Jill Gibson, OSB #973581
GIBSON LAW FIRM, LLC
1500 SW Taylor Street
Portland, OR 97205
Telephone: 503-686-0486
Fax: 866-511-2585
Email: jill@gibsonlawfirm.org
Petitioner

CERTIFICATE OF FILING

I certify that I directed the original PETITIONER JILL GIBSON'S REPLY TO RESPONDENT'S ANSWER (Initiative Petition #2016-035) 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 August 19th, 2015.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PETITIONER JILL GIBSON'S REPLY TO RESPONDENT'S ANSWER (Initiative Petition #2016-035) upon the following individuals on August 19th, 2015, by using the court's electronic filing system pursuant to ORAP 16 on August 4, 2015.

Ellen F. Rosenblum Anna Marie Joyce, OSB #013112 Matthew J. Lysne, OSB #025422 Department of Justice 1162 Court St. NE Salem, OR 97310-4096 Telephone: (503) 378-4402 Facsimile: (503) 378-6306 *Attorneys for Respondent*	Steven C. Berman, OSB #951769 Email: sberman@stollberne.com Stoll Berne 209 SW Oak Street, Suite 500 Portland, OR 97204 *Attorneys for Heather Conroy, Amicus Curiae*
Margaret S. Olney, OSB #881359 Bennett, Hartman, Morris & Kaplan 210 SW Morrison Street, Suite 500 Portland, OR 97204-3149 Telephone: (503) 227-4600 Facsimile: (503) 248-6800 *Attorneys for Petitioners Hanna Vaandering and Bethanne Darby*	Eric C Winters 30710 SW Magnolia Ave Wilsonville OR 97070 *Petitioner (S063365)*

Dated: August 19th, 2015

/s/Jill Gibson

1500 S.W. Taylor St
Portland, OR 97205
Telephone: 503-686-0486
Fax: 866-511-2585
Email: jill@gibsonlawfirm.org