



DEPARTMENT OF JUSTICE
APPELLATE DIVISION

March 20, 2014

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

Re: *Scott Bates; Scott Dahlman and Terry Witt v. Ellen Rosenblum, Attorney General, State of Oregon*
SC S062075 (control), S062077

Dear Chief Justice Balmer:

Petitioner Scott Bates; and petitioners Scott Dahlman and Terry Witt, have filed ballot title challenges in the above-referenced matter. Pursuant to ORS 250.067(4), the Secretary of State is required to file with the court the written comments submitted in response to the draft ballot title. Those written comments, under the cover of Elections Division Program Representative Lydia Plukchi's letter, are enclosed for filing with the court. Pursuant to ORAP 11.30(7), we also have enclosed for filing with the court the draft and certified ballot titles, together with their respective cover letters.

Sincerely,

/s/ Matthew J. Lysne

Matthew J. Lysne
Senior Assistant Attorney General
matthew.j.lysne@doj.state.or.us

MJL:aft/5111370

cc: Steven C. Berman/without encl.
John DiLorenzo, Jr./without encl.
Aurora Paulsen/without encl.

IN THE SUPREME COURT OF THE STATE OF OREGON

SCOTT BATES,

Petitioner,

v.

ELLEN ROSENBLUM, Attorney
General, State of Oregon,

Respondent.

Supreme Court No. S062075 (Control)

SCOTT DAHLMAN and TERRY
WITT,

Petitioners,

v.

ELLEN ROSENBLUM, Attorney
General, State of Oregon,

Respondent.

Supreme Court No. S062077

RESPONDENT'S ANSWERING
MEMORANDUM TO PETITIONS TO
REVIEW BALLOT TITLE RE:
INITIATIVE PETITION NO. 44
(SUPREME COURT)

Petitioners Scott Dahlman and Terry Witt, and petitioner Scott Bates petition for review of the Attorney General's certified ballot title for Initiative Petition (IP) 44 (2014). This court reviews ballot titles for "substantial compliance with the requirements of ORS 250.035." ORS 250.085(5). In Case No. S062075, petitioner Bates challenges the "yes" vote result statement; in Case No. S062077, petitioners Scott Dahlman and Terry Witt challenge all four parts of the ballot title. For the reasons discussed below, the prepared ballot title substantially complies with ORS 250.035(2), with the exception of a

drafting error in the “yes” vote result statement. This court should modify the ballot title to correct that error and certify the ballot title as modified.

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

Petitioners Dahlman and Witt first challenge the caption. The caption reads:

Requires food manufacturers, retailers to label “genetically engineered” foods as such; state, citizens may enforce

A ballot title caption must contain “not more than 15 words that reasonably identifies the subject matter of the state measure.” ORS 250.035(2)(a).

Dahlman and Witt contend that the caption is deficient in three respects. First, they contend that the caption fails to identify the term “genetically engineered” as a “defined term,”—that the caption fails to include the modifier “(defined)” and should instead read as “genetically modified (defined).” (Dahlman / Witt Petition, 4). Second, they contend that the caption fails to identify that the measure would provide for “citizen lawsuits.” (*Id.* at 5). Third, they contend that the caption fails to identify that the labeling requirement would not apply to “some” genetically engineered foods, *i.e.* packaged foods containing genetically engineered materials that comprise less than 0.9% of the total weight of the packaged food—and that the ballot title should be the same as those provided

for related ballot measures, IP 13 and IP 27. (*Id.* at 4-5). They contend that the following caption would resolve those concerns:

Requires manufacturers, retailers, to label some “genetically engineered” (defined) foods; enforced by state/citizen lawsuits.

(*Id.* at 5). For the reasons explained below, Dahlman and Witt’s objections are not well taken.

First, an omission of the modifier “(defined)” does not make the caption inadequate. Petitioners are correct that in some instances, a caption must identify that a measure defines a specially used phrase in a particular way. *See, e.g., Wilkeson v. Myers*, 329 Or 540, 545, 992 P2d 456 (1999) (the prepared caption “Requires sustainable forestry practices * * *” was inadequate in that the caption “must inform voters that the measure defined the phrase ‘Sustainable Forest Practices’ in a particular way”). In addition, this court “has approved the use of specially defined terms in quotation marks, followed by the word ‘defined’ in parentheses, to signal that the proposed measure specially defines the term and uses it in that specially defined sense.” *Carley v. Myers*, 340 Or 222, 229, 132 P3d 651 (2006) (citing *Hunnicut v. Myers*, 340 Or 83, 86, 127 P3d 1182 (2006) as illustrating that principle). However, neither *Wilkeson* nor *Carley* require that the caption must include the word “(defined)” (or

something similar) to convey that a measure defines a term in a special way.

To the contrary, in *Carley*, the court explained that upon referral of that measure, that “[t]he Attorney General *may* decide on referral whether to insert ‘defined,’ or another similar signal, following the phrase ‘nursing home’ in the caption.” *Carley*, 340 Or at 229 n 3 (emphasis added). Here, the caption identifies the term “genetically engineered” in quotation marks, which plainly signals that the term has a special meaning, and later provides a definition for that term in the summary. The caption’s omission of the word “(defined)” does not render it invalid under ORS 250.035(2)(a) provided that the caption reasonably identifies the subject matter of the measure. Here, the caption reasonably identifies the subject matter of IP 44—imposing a labeling requirement for certain specially defined “genetically engineered” foods.

Second, the caption need not include the phrase “citizen lawsuits.” Petitioners contend that *Wilkeson* supports the proposition that a ballot title must identify when a measure provides for “citizen lawsuits.” *See, e.g., Wilkeson*, 329 Or at 546 (modifying “yes” vote result statement to include that the measure “allows citizen lawsuits”). However, in *Wilkeson*, the measure at issue amended an existing law, the Oregon Forest Practices Act, ORS 527.610, *et seq.*, and included a provision that created a new enforcement mechanism—

an action by private citizens. It is within that context that the court concluded that a reference to allowing “citizen lawsuits” was necessary. In contrast, the ballot measure at issue here creates a new law—a labeling requirement—and permits enforcement of that new law either by the state or by “injured citizens of Oregon acting in the public interest.” (Petition, S062077, Ex 1, at 5-6). As such, the caption’s phrase “state, citizens may enforce” the measure reasonably identifies that the measure permits private persons and the state to enforce the measure—and voters would understand that the act of “enforcing” would encompass lawsuits.¹ Accordingly, the caption is not deficient for failing to include the term “citizen lawsuits.”

Third, the caption is not deficient for not identifying that “some” genetically engineered foods would not be subject to the measure, because that assertion is incorrect. The measure provides that “[c]ommencing January 1, 2016, *all* raw food and packaged food that is entirely or partially produced with genetic engineering must be labeled in accordance with the provisions of this Act and is otherwise misbranded if that fact is not disclosed.” (Petition, S062077, Ex 1, at 6, emphasis added). Petitioners correctly note that

¹ Petitioners do not assert that the term “enforce” is confusing, or that a voter might understand that the state or citizen could “enforce” the measure through some mechanism other than a lawsuit.

Section 6(3) provides an exemption for injunctions and liability for attorney fees for certain persons that fail to label (1) packaged foods containing genetically engineered materials weighing less than 0.9% of the total weight of the packaged food, or (2) food that “has not been produced with the knowing or intentional use of genetic engineering.” However, Section 6(3) provides only an exemption from injunctions and liability, it does not provide that those foods would not be otherwise fall within the scope of the measure. The breadth of the measure—that the labeling requirement would apply to “all” raw food and packaged food—distinguishes this measure from IP 13 and IP 27, both of which exempted certain foods from the labeling requirements (and not just the enforcement provisions, as IP 44 does). Thus, the caption reasonably identifies the scope of the measure. Petitioner’s contention that IP 44 applies only to “some” genetically engineered foods is incorrect.

For those reasons, this court should certify the Attorney General’s caption for IP 44.

B. The “yes” vote result statement substantially complies with ORS 250.035(2), except for one inadvertent drafting error that requires modification.

Petitioners Dahlman and Witt and petitioner Bates separately challenge

the “yes” vote result statement. The “yes” vote result statement states:

Result of “Yes” Vote: “Yes” vote requires the labeling of raw and packaged foods produced entirely or partially by “genetic engineering,” effective January 2016; applies to retailers, shippers, manufacturers.

ORS 250.035(2)(b) provides that the 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.” Dahlman and Witt contend that the “yes” vote result statement is deficient in two respects: (1) it, like the caption, fails to identify that the result of the measure “will be to subject only some raw and packaged foods produced by genetic engineering to enforcement of the labeling requirements”; and (2) it “does not adequately reference the enforcement mechanism provided by the proposed measure.” (Dahlman / Witt Petition, 6). Bates contends that the “yes” vote result statement contains a drafting error, *i.e.* the statement should have used the term “suppliers” instead of “shippers.” (Bates Petition, 3). As will be explained below, Bates’s argument is well taken, Dahlman and Witt’s arguments are not.

1. Dahlman’s and Witt’s arguments

As noted above, Dahlman and Witt first argue that voters may be misled to believe that a yes vote would subject only “some” foods to enforcement of

labeling requirements. However, Dahlman and Witt did not present that argument in response to the draft ballot title for IP 44. The draft ballot title read:

Result of “Yes” Vote: “Yes” vote requires labelling [sic] of raw and packaged foods produced entirely or partially by genetic engineering, effective January 2016. Violators subject to injunctions, attorney fees.

In response to the draft ballot title, Dahlman and Witt expressed two concerns: (1) the statement “fails to identify that the result of a yes vote will subject only some raw and packaged food produced by genetic engineering to the labeling requirements[;]” and (2) “it “does not specify that violations may be enjoined by the Attorney General or citizen lawsuits.” (Dahlman / Witt Petition, Ex 2, at 3). So stated, Dahlman and Witt only challenged the draft’s identification of (1) the scope (or breadth) of the labeling requirement and (2) the availability of state and private lawsuits. Dahlman and Witt did *not* argue that the draft failed to identify that persons would be exempted from “Attorney General or citizen lawsuits” for foods that lacked a certain weight of genetically engineered materials or that were not produced with “the knowing or intentional use of genetic engineering.” Given that the draft and certified ballot titles do not differ with respect to the argument Dahlman and Witt now raise, and given that they

did not raise that argument earlier, this court should not consider it. *See* ORS 250.085(6) (this court “shall not consider arguments concerning the ballot title not presented in writing to the Secretary of State unless the court determines that the argument concerns language added to or removed from the draft title after expiration of the comment period provided in ORS 250.067”).

In any event, their argument lacks merit. Dahlman’s and Witt’s statement that the effect of the measure would be “to subject only some raw and packaged foods produced by genetic engineering to enforcement of the labeling requirements[,]” erroneously suggests that some raw and packaged foods are exempt from enforcement of labeling requirements. That statement is incorrect. As explained above, the exemption from enforcement of labeling requirements set out in Section 6(3) applies to “persons” under specified circumstances—and not to “some raw and packaged foods.”²

² An example illustrates this point. Section 5(2) of the measure provides that a supplier must label containers of genetically engineered raw food. If a supplier knowingly mislabeled a container of genetically engineered raw food, and if that raw food was used by a manufacturer to produce a packaged food that had less than 0.9% genetically engineered raw food (by weight), the following results would occur: the supplier would be subject to an enforcement action (for misbranding); the manufacturer would not (in light of the exemption provided in Section 6(3)).

In addition, the “yes” vote result statement is not deficient for failing to repeat that the measure would permit enforcement actions. When read in conjunction with the caption, which again provides that “state, citizens may enforce[,]” the statement properly informs that the measure would permit enforcement actions by the state or citizens for violations of the measure’s labeling requirements.

2. Bates’s argument

Petitioner Bates’s argument is well taken. As Bates explains, the measure contains provisions that would apply to “suppliers” and does not discuss or address “shippers” at all. The Attorney General agrees that this court should modify the “yes” vote result statement by substituting “suppliers” for “shippers,” as follows:

Result of “Yes” Vote: “Yes” vote requires the labeling of raw and packaged foods produced entirely or partially by “genetic engineering,” effective January 2016; applies to retailers, suppliers, manufacturers.

C. The “no” vote result statement

Petitioners Dahlman and Witt also challenge the “no” vote result statement. The “no” vote result statement states:

Result of “No” Vote: “No” vote retains existing law, which does not require “genetically engineered” food be labeled as such.

They contend that the “no” vote result statement is not parallel with the “yes” vote result statement. (Petition, S062077, at 6); *see* ORS 250.035(3) (providing that the “yes” and “no” vote result statements “shall be written so that, to the extent practicable, the language of the two statements is parallel”). However, the statements are sufficiently parallel: the “yes” vote result statement explains that the measure would require the labeling of genetically engineered foods; the “no” vote result statement explains that it would retain existing law that does not require such labeling.

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

Lastly, petitioners Dahlman and Witt challenge the summary. The summary states:

Summary: Current law does not require labeling of “genetically engineered” food. Measure requires retailers of genetically-engineered raw food to include “Genetically Engineered” on packages, display bins, or shelves; suppliers must label shipping containers. Requires manufacturers of packaged food produced entirely or partially by genetic engineering to include “Produced with Genetic Engineering” or “Partially Produced with Genetic Engineering” on packages. Defines “genetically engineered” food as food produced from organisms with genetic material changed through in vitro nucleic acid techniques and certain cell-fusing techniques; exempts traditional plant-breeding techniques like hybridization. Does not apply to animal feed or food served in restaurants. Directs agencies to implement law. Permits state, injured citizen to sue manufacturer,

retailer for knowing/intentional violation; attorney fees for prevailing citizen. Other provisions.

Dahlman and Witt contend that the summary is deficient in three respects: (1) it “should state that the current law prohibits manufacture, sales, [or] delivery of misbranded food”; (2) it does not “make clear that a genetically engineered label must appear conspicuously on packages, display bins or shelves”; and (3) it does not “adequately discuss the exemption in the act for ‘ready to eat food at bake sales or restaurants.’” (Dahlman / Witt Petition, 6). Their objections are not well taken.

First, the summary need not include a recitation on existing law prohibiting misbranded food. ORS 250.035(2)(d) provides that the summary must explain “the state measure and its major effect.” “The major effect of a measure is the way in which it proposes substantively to *change* existing law * * * [.]” *Eaton v. Keisling*, 311 Or 415, 423, 813 P2d 37 (1991) (emphasis in original). Here, the measure does not substantively change existing law prohibiting misbranded food. Rather, the measure provides a new prohibition on mislabeling genetically engineered foods.

Second, the summary need not specifically explain that labeling appear “conspicuously” on packages, display bins, or shelves. Dahlman and Witt are

generally correct in that Section 5 of the measure generally provides that most—but not all³—labeling must be placed “clearly and conspicuously” on the front or back of packages, or on store shelves, or in store bins. In any event, the particular location or placement of the label is ancillary to the major effects of the measure: the labeling requirement and the enforcement provisions for the state and citizens. Dahlman and Witt’s contrary argument fails to establish that the caption does not substantially comply with ORS 250.035(2)(d).

Third, and lastly, the caption need not identify that the measure would exempt “ready to eat food at bake sales or restaurants.” Under Section 3(3), those foods are excepted from the definition of “packaged food.” However, any exemption for bake-sale or restaurant food is likely of minor import to a voter and is not one of the “major effects” of the measure. Accordingly, even without identification of an exemption for bake-sale or restaurant foods, the summary substantially complies with ORS 250.035(2)(d).

³ Suppliers may not be subject to the requirement to “clearly and conspicuously” label shipping containers. (*See* Section 5(2), providing that “[t]he supplier must label each container used for packaging, holding, and/or transporting any raw food produced with genetic engineering that is delivered directly to Oregon retailers”).

E. Conclusion

For the reasons set forth above, this court should modify the “yes” vote result statement to substitute the word “suppliers” for “shippers” and, so modified, certify the Attorney General’s certified ballot title for IP 44 to the Secretary of State.

Respectfully submitted,

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/s/ Matthew J. Lysne

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March 3, 2014

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

Re: Steven Berman and John DiLorenzo, Jr. v. Ellen Rosenblum, Attorney General, State of Oregon
Petition to Review Ballot Title

Dear Ms. Joyce:

Pursuant to ORS 250.067(4), we transmit to you for filing with the court as part of the record in the above referenced matter, the written comments filed in this office pursuant to ORS 250.067(1), regarding initiative petition #44. We also enclose the draft and certified ballot titles with their respective transmittal letters.

Sincerely,

LYDIA FURKIN
Compliance Specialist

enclosures

Prospective Petition for State Measure

SEL 310

rev 1/12: ORS 250.045

To the Secretary of State,

We, the undersigned, request a ballot title for the attached proposed measure to be submitted to the people of Oregon for their approval or rejection at the election to be held on November 4th, 2014.

Type of Petition

☒ Initiative

☐ Referendum

☒ Statutory

☐ Constitutional

Designating Chief Petitioners

Every petition must designate not more than three persons as chief petitioners, setting forth the name, residence address and title (if officer of sponsoring organization) of each. All chief petitioners for an initiative or referendum petition must sign this form. Please carefully read the instructions for circulators and signers on the back of this form.

Chief Petitioner Information

Name print

Signature

1 Scott Bates

Residence Address, Street/Route

SW Bretton Ct

City

Tigard

State

OR

Zip Code

97224

Mailing Address if different, Street/Route

City

State

Zip Code

Email Address and/or Website

Day Phone Number

Sponsoring Organization if any

Name print

Signature

2 AURORA PAULSEN

Residence Address, Street/Route

SE HARVEY ST.

City

PORTLAND

State

OR

Zip Code

97202

Mailing Address if different, Street/Route

City

State

Zip Code

Email Address and/or Website

Day Phone Number

Sponsoring Organization if any

2centerforfoodsafety.org

Name print

Signature

3 Residence Address, Street/Route

City

State

Zip Code

Mailing Address if different, Street/Route

City

State

Zip Code

Email Address and/or Website

Day Phone Number

Sponsoring Organization if any

RECEIVED
2013 DEC 10 AM 9 15
KATE BROWN
SECRETARY OF THE STATE

SEL 301: Statement One or More Petition Circulators Will be Paid

rev 1/12: ORS 250.045, ORS 250.165, ORS 255.165, ORS 255.135

☐ Prospective Petition initial filing with filing officer

I/We hereby declare one or more petition circulators will be paid money or other valuable consideration for obtaining signatures of active registered voters on the attached petition. I/We understand the filing officer must be notified not later than the 10th day after I/we first have knowledge or should have had knowledge that no petition circulator will be compensated for obtaining signatures. By signing this document, I hereby state that no circulators will be compensated on this petition based on the number of signatures obtained by the circulator.

☐ Completed Petition signatures submitted to filing officer

By signing this document, I hereby state that no circulators have been compensated on this petition based on the number of signatures obtained by the circulator.

Identify Petition

Signed

Date Signed

Signed

Date Signed

Signed

Date Signed

→ Statement must be signed by all chief petitioners for an initiative or referendum petition.



Warning

Supplying false information on this form may result in conviction of a felony with a fine of up to \$125,000 and/or prison for up to 5 years.

SEL 301: Statement No Petition Circulators Will be Paid

rev 1/12: ORS 250.045, ORS 250.165, ORS 255.165, ORS 255.135

☒ Prospective Petition Initial Filing with Filing Officer

I/We hereby declare no petition circulators will be paid money or other valuable consideration for obtaining signatures of active registered voters on the attached petition. I/We understand the filing officer must be notified not later than the 10th day after I/we first have knowledge or should have had knowledge that any petition circulator will be compensated for obtaining signatures. By signing this document, I hereby state that no circulators will be compensated on this petition.

☐ Completed Petition Signatures Submitted to filing officer

By signing this document, I hereby state that no circulators were compensated for obtaining signatures on the attached petition.

Identify Petition

Labeling of Genetically Engineered Raw and Packaged Food

Signed

Date Signed

Signed

Date Signed

Signed

Date Signed

RECEIVED
2013 DEC 10 AM 9 15
KATE BROWN
SECRETARY OF THE STATE

12/6/13

12/6/13

→ Statement must be signed by all chief petitioners for an initiative or referendum petition.



Warning

Supplying false information on this form may result in conviction of a felony with a fine of up to \$125,000 and/or prison for up to 5 years.

**BE IT ENACTED BY THE PEOPLE OF THE STATE OF OREGON:
AN ACT REQUIRING THE LABELING OF GENETICALLY ENGINEERED RAW
AND PACKAGED FOOD**

Section 1. Findings and Declarations

- (1) Oregon consumers have the right to know whether the foods they purchase were produced with genetic engineering so they can make informed purchasing decisions. Labeling is necessary to ensure that Oregon consumers are fully and reliably informed about the products they purchase and consume. Labels provide informed consent and prevent consumer deception. Polls consistently show that the vast majority of the public wants to know if its food was produced with genetic engineering, for a variety of reasons.
- (2) For multiple health, personal, economic, environmental, religious, and cultural reasons, the State of Oregon finds that food produced with genetic engineering should be labeled as such, as evidenced by the following.
- (3) In the United States, there is currently no federal or Oregon State requirement that genetically engineered foods be labeled. In contrast, sixty-four countries, including Japan, South Korea, China, Australia, Russia, India, the European Union member states, and other key U.S. trading partners, already have laws mandating disclosure of genetically engineered foods on food labels. In 2011, Codex Alimentarius, the food standards organization of the United Nations, stated that governments are free to decide on whether and how to label foods produced with genetic engineering.
- (4) The U.S. Food and Drug Administration (FDA) does not require or conduct safety studies of genetically engineered foods. Instead, any safety consultations are voluntary, and genetically engineered food developers may decide what information to provide to the agency. Market approval of genetically engineered food is based on industry research alone. There have been no long-term or epidemiological studies in the U.S. that examine the safety of human consumption of genetically engineered foods.
- (5) The genetic engineering of plants and animals often causes unintended consequences. Manipulating genes via genetic engineering and inserting them into organisms is an imprecise process. The results are not always predictable or controllable. Mixing plant, animal, bacterial, and viral genes through genetic engineering in combinations that cannot occur in nature may produce results that lead to adverse health or environmental consequences.
- (6) U.S. government scientists have stated that the artificial insertion of genetic material into plants via genetic engineering can cause a variety of significant problems with plant foods. Such genetic engineering may increase the levels of known toxicants or allergens in foods and create new toxicants or allergens with consequent health concerns.

- (7) Independent scientists are limited from conducting safety and risk-assessment research of genetically engineered materials used in food products due to industry restrictions on research of genetically engineered materials used in food products.
- (8) Mandatory identification of foods produced with genetic engineering can provide a method for detecting, at a large epidemiological scale, the potential health effects of consuming such foods.
- (9) Without mandatory disclosure, consumers of genetically engineered food may unknowingly violate their dietary and religious beliefs.
- (10) Numerous foreign markets with restrictions on foods produced with genetic engineering have restricted imports of U.S. crops due to concerns about genetic engineering. Some foreign markets are choosing to purchase agricultural products from countries other than the U.S. because genetically engineered crops are not identified in the U.S., which makes it impossible for buyers to determine what does or does not meet their national labeling laws or restrictions and thus renders U.S. products less desirable.
- (11) Mandatory identification of foods produced with genetic engineering can be a critical method of preserving the economic value of exports or domestically sensitive markets with restrictions on, or prohibitions against, genetic engineering.
- (12) Oregon's agricultural economy is remarkably diverse, third overall among the states. Two hundred twenty-five agricultural commodities are produced in Oregon, and the state is the top producer nationally of 14 of those. Over 80 percent of Oregon's agricultural products are exported out of state, and agricultural products rank second in value among Oregon's exports. Preserving the identity, quality, and reliability of Oregon's agricultural products and exports is critical to Oregon's economic well-being.
- (13) The organic food industry is a rapidly growing industry, with 2.7 billion dollars in growth in 2012. While total U.S. food sales grew at a rate of 3.7 percent, the organic food industry grew at a rate of 10.2 percent in 2012, accounting for 31.5 billion dollars in sales. Sales of organic fruits and vegetables account for 43 percent of those new dollars, 34.8 percent of total organic food sales, and 10.3 percent of all U.S. fruit and vegetable sales. Organic dairy grew at a rate of 7.1 percent in 2012 and comprises over 6 percent of the total U.S. dairy market. Trade industry data shows that, over the long term, organic farming is more profitable and economically secure than conventional farming. Organic farmers are prohibited from using genetically engineered seeds. Nonetheless, organic crops are routinely threatened with transgenic contamination from neighboring fields of genetically engineered crops. The risk of contamination can erode public confidence in organic products, significantly undermining the job-creating, economy-boosting growth of the organic market. Requiring the labeling of foods produced through genetic engineering will help protect organics nationwide by increasing identification of genetically engineered foods through the food production process, thereby reducing the risk of contamination.

- (14) U.S. Department of Agriculture (USDA) data shows that Oregon ranks 3rd in organic farm-gate sales at \$233 million a year. This important element of Oregon's economy must be protected. Foods identified as non-genetically engineered constitute the fastest growing market segment in agriculture. However, only a small portion of the food industry participates in voluntary labeling of foods claimed not to be the product of genetic engineering. Nor are there consistent standards for such labeling, or for enforcement of voluntary labels. As such, voluntary labels are insufficient to provide consumers with adequate information on whether or not the food they are purchasing was produced with genetic engineering and may be misleading.
- (15) Requiring that foods produced through genetic engineering be labeled as such will create additional market opportunities for producers who are not certified as organic and whose products are not produced through genetic engineering. Such additional market opportunities will also contribute to vibrant and diversified agricultural communities.
- (16) The cultivation of genetically engineered crops can have serious effects on the environment. For example, in 2013, 93 percent of all soy grown in the U.S. was engineered to be herbicide resistant. In fact, the vast majority of genetically engineered crops are designed to withstand herbicides, and therefore promote indiscriminate herbicide use. As a result, genetically engineered, herbicide resistant crops have caused 527 million pounds of additional herbicides to be applied to the nation's farmland. These toxic herbicides damage the vitality and quality of our soil, harm wildlife, contaminate our drinking water, and pose health risks to consumers and farmworkers. Further, because of the consequent massive increase in the use of herbicides, herbicide-resistant weeds have developed and flourished, infesting farm fields and roadsides, complicating weed control for farmers, and causing farmers to resort to more and increasingly toxic herbicides.
- (17) The people of Oregon should have the choice to avoid purchasing foods produced in ways that can lead to such environmental harm.
- (18) Because neither the FDA nor the U.S. Congress requires the labeling of food produced with genetic engineering, the State should require foods produced with genetic engineering to be labeled as such in order to serve the interests of the State, prevent consumer deception, prevent potential risks to human health, promote food safety, protect cultural and religious practices, protect the environment, and promote economic development.

Section 2. Statement of Purpose

- (1) The Genetically Engineered Raw and Packaged Food Labeling Act would result in establishing a consistent and enforceable standard for labeling foods produced using genetic engineering, and thus provide the citizens of Oregon with knowledge of how their food is produced.
- (2) The purposes of this Act are:

- a. Public health and food safety. Promote food safety and protect public health by enabling consumers to avoid potential risks associated with genetically engineered foods, and serve as a risk management tool enabling consumers, physicians, and scientists to identify unintended health effects resulting from consumption of genetically engineered foods.
- b. Environmental impacts. Assist consumers who are concerned about the potential effects of genetic engineering on the environment to make informed purchasing decisions.
- c. Consumer confusion and deception. Reduce and prevent consumer confusion and deception and promote the disclosure of factual information on food labels to allow consumers to make informed decisions.
- d. Promoting and protecting economic development. Create and protect non-genetically engineered markets and enable consumers to make informed purchasing decisions.
- e. Protecting religious and cultural practice. Provide consumers with data from which they may make informed decisions for personal, religious, moral, cultural, or ethical reasons.

(3) This law shall be liberally construed to fulfill these purposes.

Section 3. Definitions

- (1) As used in this Act, except as otherwise provided, terms shall have the meaning given to them in ORS Title 49, Chapter 616, except that the term "food" shall include food only for human consumption and not any food for consumption by animals.
- (2) "Raw food" shall have the same meaning as raw agricultural commodity as defined in ORS 616.205(17).
- (3) "Packaged food" means any food offered for retail sale in Oregon, other than raw food and food served, sold, or provided ready to eat in any bake sale, restaurant, or cafeteria, and that is already otherwise subject to the provisions of ORS 616.250 prohibiting misbranding.
- (4) "Genetically engineered" means produced from an organism or organisms in which the genetic material has been changed through the application of:
 - (a) In vitro nucleic acid techniques which include, but are not limited to, recombinant deoxyribonucleic acid (DNA) or ribonucleic acid (RNA), direct injection of nucleic acid into cells or organelles, encapsulation, gene deletion, and doubling; or
 - (b) Methods of fusing cells beyond the taxonomic family that overcome natural physiological, reproductive, or recombination barriers, and that are not techniques used in traditional breeding and selection such as conjugation, transduction, and hybridization.

For purposes of this definition: “*In vitro* nucleic acid techniques” include, but are not limited to, recombinant DNA or RNA techniques that use vector systems; techniques involving the direct introduction into the organisms of hereditary materials prepared outside the organisms such as biolistics, microinjection, macro-injection, chemoporation, electroporation, microencapsulation, and liposome fusion.

Section 4. Labeling of Genetically Engineered Raw and Packaged Foods

Commencing January 1, 2016, all raw food and packaged food that is entirely or partially produced with genetic engineering must be labeled in accordance with the provisions of this Act and is otherwise misbranded if that fact is not disclosed.

Section 5. Means of Labeling

- (1) In the case of raw food packaged for retail sale, the manufacturer shall include the words “Genetically Engineered” clearly and conspicuously on the front or back of the package of such commodity. In the case of raw agricultural commodities that are not separately packaged or labeled, the retailer shall place a clear and conspicuous label on the retail store shelf or bin in which such commodity is displayed for sale.
- (2) To make clear who is responsible for compliance with the requirements of this section, in the case of raw food, the retailer is responsible only for point of purchase shelf labeling. The supplier must label each container used for packaging, holding, and/or transporting any raw food produced with genetic engineering that is delivered directly to Oregon retailers.
- (3) In the case of any packaged food containing some products of genetic engineering, the manufacturer must label the product in clear and conspicuous language on the front or back of the package of such food product with the words “Produced with Genetic Engineering” or “Partially Produced with Genetic Engineering.”
- (4) This law shall not be construed to require either the listing or identification of any ingredient or ingredients that were genetically engineered or that the term “genetically engineered” be placed immediately preceding any common name or primary product descriptor of a food.

Section 6. Enforcement

- (1) The Attorney General may bring an action to enjoin a violation of this Act in any court of competent jurisdiction.
- (2) Any injured citizen of Oregon acting in the public interest may bring an action to enjoin a violation of this Act by a manufacturer or retailer, in any court of competent jurisdiction, if the action is commenced more than sixty (60) days after the citizen has given notice of the alleged violation to the Attorney General and to the alleged violator. The court may, in such an action, award to a citizen who is a prevailing plaintiff reasonable attorneys’ fees and costs

incurred in investigating and prosecuting the action, but the court may not award any monetary damages.

- (3) No person shall be subject to an injunction or responsible for payment of prevailing party attorneys' fees for failure to label any food if (a) in the case of packaged food, the materials produced through genetic engineering do not account for more than nine tenths of one percent of the total weight of the packaged food; or (b) the food has not been produced with the knowing or intentional use of genetic engineering.
- (4) For purposes of this Act, food will be considered not to have been produced with the knowing or intentional use of genetic engineering if:
 - (a) such food is lawfully certified to be labeled, marketed, and offered for sale as "organic" pursuant to the federal Organic Foods Production Act of 1990, 7 U.S.C. §§ 6501 *et seq.*, which already prohibits genetic engineering of foods;
 - (b) in the case of a manufacturer or retailer obligated to label any food under this Act, if such entity has obtained from whoever sold that food to them a sworn statement that the food has not been knowingly or intentionally genetically engineered and has been segregated from, and not knowingly or intentionally commingled with, foods that may have been genetically engineered at any time. In providing such a sworn statement, a manufacturer or retailer may rely on a sworn statement from a supplier that contains such an affirmation; or
 - (c) an independent organization has determined that the food has not been knowingly or intentionally genetically engineered and has been segregated from, and not knowingly or intentionally commingled with, foods that may have been genetically engineered at any time, if such a determination has been made pursuant to a sampling and testing procedure (i) consistent with sampling and testing principles recommended by internationally recognized standards organizations and (ii) which does not rely on testing processed foods in which no DNA is detectable.
- (5) Unless the retailer is also the producer or the manufacturer of the food and sells the food under a brand it owns, no act or omission or any retailer shall be found to be a violation of this Act except for knowing and willful failure to provide point of purchase labeling for unpackaged raw agricultural commodities. In any action in which it is alleged that a retailer has violated the provisions of this section, it shall be a defense that such retailer reasonably relied on (a) any disclosure whether a food was produced through genetic engineering contained in the bill of sale or invoice provided by the wholesaler or distributor or (b) the lack of such disclosure.
- (6) No action may be brought against any farmer for any violation of any provision of this Act unless such farmer is also a retailer or manufacturer, but any farmer submitting a false sworn statement under subsection (4) of this section shall be subject to the general laws of the state pertaining to perjury.

- (7) The State Department of Agriculture and/or the Oregon Health Authority shall prescribe, enact, and enforce rules necessary to implement this Act. The Department and Authority are not authorized to exempt from the requirements of Section 4 of this Act any food product that is made subject to those requirements by the provisions of this Act. The Department and/or Authority may by regulation provide that a person may be subject to an injunction and prevailing party attorneys' fees under this Act for failure to label packaged food described in subsection 3(a) of this Section 6 at such time as the Department and/or Authority determine that the commercial availability of relevant materials not produced with genetic engineering make it economically and commercially practicable to apply the labeling requirements of this Act to such packaged food.

Section 7. Severability

If any part or application of this Act is held invalid with respect to any particular raw or packaged food, situation, or entity, the remainder of this Act or its application to all other raw and packaged foods, situations, and entities shall not be affected.

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2013 DEC 10 AM 9 15
KATE BROWN
SECRETARY OF THE STATE

ELLEN F. ROSENBLUM
Attorney General



FREDERICK M. BOSS
Deputy Attorney General

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

January 13, 2014

Jim Williams
Director, Elections Division
Office of the Secretary of State
141 State Capitol
Salem, OR 97310

Re: Proposed Initiative Petition — Measure Requires Food Manufacturers and Retailers to
Label Genetically-Engineered Foods, Provides for Citizen Lawsuit
DOJ File #BT-44-14; Elections Division #44

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 labeling of genetically engineered foods.

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

A copy of the draft ballot title is enclosed.

Sincerely,

C
Cameron Craft
Legal Secretary

chc/4911283

Enclosure

Scott Bates
SW Bretton Ct.
Tigard, OR 97224

Aurora Paulsen
SE Harney St.
Portland, OR 97202

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KATE BROWN
SECRETARY OF THE STATE

DRAFT BALLOT TITLE

Measure requires food manufacturers and retailers to label genetically-engineered foods, provides for citizen lawsuit

Result of "Yes" Vote: "Yes" vote requires labelling of raw and packaged foods produced entirely or partially by genetic engineering, effective January 2016. Violators subject to injunctions, attorney fees.

Result of "No" Vote: "No" vote retains existing law which does not require labelling of genetically-engineered food as such.

Summary: Requires retailers of genetically-engineered raw food to include "Genetically Engineered" on packages, display bins, or shelves; suppliers must label shipping containers. Requires manufacturers of packaged food produced entirely or partially by genetic engineering to include "Produced with Genetic Engineering" or "Partially Produced with Genetic Engineering" on packages of such food. Defines "genetically engineered" food as food produced from organisms with genetic material changed through in vitro nucleic acid techniques and certain cell-fusing techniques, exempts traditional plant-breeding techniques like hybridization. Does not apply to animal feed or food served in restaurants. Directs agencies to implement law. Permits any injured citizen to sue manufacturer or retailer for a knowing and intentional violation of rules. Allows attorney fee awards for prevailing citizens but not damages.

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KATE BROWN
SECRETARY OF THE STATE

STOLL BERNE

STOLL STOLL BERNE LOKTING & SHLACHTER P.C. LAWYERS

Steven C. Berman
sberman@stollberne.com

January 28, 2014

VIA FACSIMILE

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

RECEIVED
2014 JAN 28 PM 1 51
KATE BROWN
SECRETARY OF THE STATE

Re: Draft Ballot Title for Initiative Petition No. 44 for the General Election of November 4, 2014

Dear Secretary Brown:

I represent Scott Bates regarding the ballot title for Initiative Petition No. 44 for the general election of November 4, 2014 (the "Initiative"). Mr. Bates is an elector in the State of Oregon and Chief Petitioner for the Initiative. This letter is written in response to your office's press release, dated January 14, 2014, which invites comments on the draft ballot title for the Initiative. Mr. Bates objects to each section of the ballot title, because each section inadequately describes the enforcement provisions of the Initiative. Mr. Bates respectfully submits that, as a result, the ballot title is not statutorily compliant. Mr. Bates requests that the ballot title be revised on that narrow ground.

I. An Overview of Initiative Petition No. 44

The Initiative creates the Genetically Engineered Raw and Packaged Food Labeling Act. The Initiative requires food manufacturers and retailers to label genetically-engineered foods. The Initiative has seven sections. The first section is findings and policy declarations. Section 2 is a statement of purpose. Section 3 contains definitions. Sections 4 and 5 are the substantive provisions. Section 4 requires labeling of all raw and packaged foods that are entirely or partially produced with genetic engineering. Section 5 sets forth the labeling required. Section 6 provides for three modes of enforcement of the Act. First, the Attorney General may bring an action to enjoin any violation of the Act. Initiative, §6(1). Second, an injured Oregon citizen acting in the public interest may bring an action to enjoin a violation, provided the citizen has first provided the Attorney General and alleged violator with notice of the violation. For a citizen action, the court may award a prevailing plaintiff his attorneys' fees and costs incurred. *Id.* at §6(2). Liability is limited for manufacturers and retailers who do not act intentionally or willfully. *Id.* at §§6(3)-6(6). Finally, the Department of Agriculture and the Oregon Health

Authority are given rulemaking and regulatory authority to enforce the Act. *Id.* at §6(7). Section 7 is a severability clause.

II. The Draft Ballot Title

A. The Caption

ORS 250.035(2)(a) provides that a ballot title must contain a “caption of not more than 15 words that reasonably identifies the subject matter of the state measure.” The caption must “state or describe the proposed measure’s subject matter accurately, and in terms that will not confuse or mislead potential petition signers and voters.” *Lavey v. Kroger*, 350 Or 559, 563 (2011) (citations omitted; internal quotation marks omitted). The “subject matter” of an initiative is its “actual major effect.” *Lavey*, 350 Or at 563 (citation omitted; internal quotation marks omitted). The “actual major effect” is the change or changes “the proposed measure would enact in the context of existing law.” *Rasmussen v. Kroger*, 350 Or 281, 285 (2011). The caption is the “cornerstone for the other portions of the ballot title.” *Greene v. Kulongoski*, 322 Or 169, 175 (1995). As the “headline,” the caption “provides the context for the reader’s consideration of the other information in the ballot title.” *Greene*, 322 Or at 175. 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 (2006). “When the Attorney General chooses to describe the subject matter of a proposed measure by listing some of its effects, [s]he runs the risk that the caption will be underinclusive and thus inaccurate.” *Towers*, 341 Or at 361.

The caption in the draft ballot title provides:

Measure requires food manufacturers and retailers to label genetically-engineered foods, provides for citizen lawsuit

The first clause in the caption accurately and fully describes the subject matter of the Initiative. That language should not be revised. Mr. Bates respectfully submits that the second clause – “provides for citizen lawsuit” – is problematic and statutorily non-compliant, for at least three reasons.

The caption’s selective emphasis on the “citizen lawsuit” enforcement mechanism of the Initiative renders the caption underinclusive. As was set forth above, the Initiative has *three* enforcement mechanisms. First, the Attorney General may seek injunctive relief. Initiative, §6(1). Second, an affected citizen – after providing notice and opportunity to cure to the Attorney General and the alleged violator – may seek injunctive relief. *Id.* at §6(2). Third, the Department of Agriculture and the Oregon Health Authority have regulatory authority and enforcement powers. *Id.* at §6(7). However, the caption focuses on only one of the Act’s three enforcement mechanisms. The caption is underinclusive for that reason and, accordingly, must be revised.

The phrase "provides for citizen lawsuit" also is uninformative, because it does not place the citizen lawsuit provision of the Initiative in context. The draft caption does not inform voters as to the purpose of the "citizen lawsuit" referenced. From the draft caption, voters would have no way of knowing that the "citizen lawsuit" is an enforcement mechanism, to prevent violations of the Genetically Engineered Raw and Packaged Food Labeling Act.

Finally, the word "lawsuit" is potentially misleading and confusing. *See Greene*, 322 Or at 175 ("[a]voiding confusing terminology in a caption is important.") "Lawsuit" generally is understood to encompass a civil action for damages. However, the citizen enforcement mechanism in the Initiative provides only for injunctive relief and prevailing plaintiff attorney fees; damages explicitly are prohibited. *See Initiative*, §6(2) ("the court may not award monetary damages"). The word "lawsuit" is not used in the Initiative. Rather, the Initiative uses the word "action." *See id.* at §§6(1), 6(2), 6(6) (referring to when an "action" may be brought). From the draft caption, voters and potential petition signers would misunderstand the scope of the limited citizen enforcement mechanism in the Initiative. For that additional reason, the phrase "provides for citizen lawsuit" should not be included in the caption.

A caption that complies with the statutory requirements would provide:

Measure requires food manufacturers and retailers to label genetically-engineered foods; provides for enforcement mechanisms

B. The Results Statements

ORS 250.035(2)(b) and (c) require that a ballot title contain "simple and understandable statement[s] of not more than 25 words that describe[] the result if the state measure is" approved or rejected.

The results statements in the draft ballot title provide:

"Yes" vote requires labeling of raw and packaged food produced entirely or partially by genetic engineering, effective January 2016. Violators subject to injunctions, attorney fees.

"No" vote retains existing law which does not require labeling of genetically-engineered food as such.

Mr. Bates respectfully submits that the phrase "[v]iolators subject to injunctions, attorney fees" is statutorily noncompliant. The phrase is underinclusive; it emphasizes the citizen enforcement provision (which is the only provision that provides for prevailing party attorney fees), and fails to set forth the multiple enforcement mechanisms contained in the Initiative. Moreover, the phrase overstates the violators subject to injunctive relief and attorneys' fees. The Initiative specifically provides that only knowing and intentional violations are actionable. *Initiative*, §§6(3), 6(4). *See also id.* at §6(5) (violations by retailers who are also producers are limited to "knowing and

Kate Brown
January 28, 2014
Page 4

willful failure" to provide point of purchase labeling). From the result of yes statement, voters would be led to believe that violators who act inadvertently or unintentionally are subject to injunctions and attorneys' fees, when they are not.

Mr. Bates submits that the phrase "as such" at the end of the result of no statement is confusing and unnecessary. Mr. Bates further submits that the remainder of the result of no statement, while accurate, is incomplete. In the light of the fact that the result of no statement may be 25 words long, it should be clarified to parallel the result of yes statement. See ORS 250.035(2)(c) (result of yes statement and result of no statement should be similar, "to the extent practical").

Results statements that comply with the statutory requirements would provide:

"Yes" vote requires labeling of raw and packaged food produced entirely or partially by genetic engineering, effective January 2016. Attorney general, agencies, citizens may enforce.

"No" vote retains existing law, which does not require labeling of raw or packaged food produced entirely or partially by genetic engineering.

C. The Summary

ORS 250.035(2)(d) requires that the ballot title contain a "concise and impartial statement of not more than 125 words summarizing the state measure and its major effect." With the exception of the final two sentences, the summary is accurate and should not be modified. However, the summary is underinclusive, because it does not provide that the Attorney General also has enforcement authority. Moreover, the phrase "permits * * * citizen to sue manufacturer or retailer" overstates the scope of the citizen enforcement provision, because it does not clarify that a citizen may obtain *only* injunctive relief and attorney fees after providing advance notice and an opportunity to cure. For those limited reasons, the summary must be revised.

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

Very truly yours,

—
Steven C. Berman

SCB:jjjs
cc: client



Suite 2400
1300 SW Fifth Avenue
Portland, OR 97201-5630

John DiLorenzo, Jr.
503.778.5216 tel
503.778.5299 fax

johndilorenzo@dwt.com

January 28, 2014

SENT VIA FACSIMILE TO: 1-503-373-7414

Honorable Kate Brown
Elections Division
255 Capitol St NE, Ste 501
Salem, OR 97310-1306

RECEIVED
2014 JAN 28 PM 12 35
KATE BROWN
SECRETARY OF THE STATE

Re: Ballot Title Comments to Initiative Petition No. 44 (2014)

Dear Madam Secretary:

This office represents Terry Witt and Scott Dahlman, registered voters in the State of Oregon. The purpose of this letter is to make comments on Mr. Witt's and Mr. Dahlman's behalf to the draft ballot title prepared by the Attorney General for Initiative Petition No. 44 (2014). We are mindful that ORS 250.035(2) requires: (a) a caption not more than 15 words that reasonably identifies the subject matter of the state measure; (b) a simple and understandable statement of not more than 25 words that describes the result if the state measure is approved; (c) a simple and understandable statement of not more than 25 words that describes the result if the state measure is rejected; and (d) a concise and impartial statement of not more than 125 words summarizing the state measure and its major effect.

Preliminary Comments

The draft ballot title for IP #44 has departed significantly from certified titles previously prepared by either the Attorney General or the Attorney General and the Supreme Court with respect to IP #13 and IP#27 which were earlier iterations of the proposed measure filed by the same chief petitioners. Those earlier ballot titles shared a common approach for characterizing the proposed measures.

IP #44 varies from its predecessors in that the findings are expanded, the definitions are shortened or defaulted to statutory definitions, and the statement of purpose is expanded. But those provisions have little to do with the ballot title.

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For instance, the number of definitions appearing in IP #44 have been reduced from 16 in IP #27 to 3: "Raw food," "packaged food" and "genetically engineered" are still defined terms. The other definitions "shall have the meaning given to them in ORS Title 49, Chapter 616, except that the term 'food' shall include food only for human consumption and not any food for consumption by animals." Previous versions required labeling on food for animals.

In previous versions, processed food containing only small amount of GE material (ninety-ninths of 1% or less by weight) were exempted until July 1, 2019. Such food is exempted indefinitely under this version, by removing sale of those products from the enforcement provisions of the proposed measure, but the Department of Agriculture or Oregon Health Authority may change that if they determine non-GE materials are available to make it "commercially practicable" to apply labeling requirements to such foods. See Section 6(7).

Specific exemptions in the previous version (IP #27) – food that would be subject solely because of GE processing aids or enzymes; alcoholic beverages; and medical food are not exempted in IP #44. That means Tillamook Cheese exempted under earlier versions, would be subject to labeling requirements in this version.

While the general enforcement language is changed somewhat in IP #44, its effects are the same as those in IP #27: allowing enforcement by the Attorney General or any injured citizens a private right of action along with an award of attorney's fees.

Because of the similarities between this proposed initiative and the former IP #27 and IP #13, the ballot title approved by the Oregon Supreme Court on November 27, 2013, a copy of which is appended hereto (as "Attachment 1"), should be the model which the Attorney General's draft should thereupon be based.

Specific Comments

1. The Attorney General's draft caption for IP #44 fails to reasonably identify the subject matter because it fails to take into account that the term "genetically engineered" is uniquely defined in Section 3 of the proposed measure. That term should be identified as a defined term in the caption. In addition, the current draft suggests that all genetically engineered foods are the subject of this proposed measure. Of course, the proposed measure still includes exemptions, although they are couched in terms of the ability of the Attorney General or private citizens to bring enforcement actions. See Section 6(3), (4). Because neither the Attorney General nor private parties will be able to enforce the proposed act with respect to some genetically engineered foods, that fact should be reflected in the ballot title. To do all this and to remain within the word count limit of 15 words, we suggest a title modeled after that certified by the Supreme Court with respect to IP #27 with the addition of a reference to enforcement.

Some genetically engineered food (defined) for retail sale must be so labeled, or is "misbranded;" allows citizen lawsuits.

2. The draft result of "yes vote statement" does not comply with the statutory requirements because it fails to identify that the result of a yes vote will subject only some raw and packaged foods produced by genetic engineering to the labeling requirements. In addition, the result statement does not specify that violations may be enjoined by the Attorney General or citizen lawsuits.

We suggest the following for a result of yes vote:

"Yes" vote expands definitions of "misbranded" food to include some genetically engineered food (defined) when not so labeled for retail sale; allows citizen enforcement lawsuits.

3. The draft result of "no vote statement" does not comply with the statutory requirements because it is not written in a parallel fashion to the result of yes vote statement. We suggest the result of no vote statement which was certified by the Supreme Court concerning IP #27: "No" vote retains current definition of "misbranded" as used in law prohibiting the misbranding of food and the manufacture, sale, or delivery of misbranded food.

4. Finally, the draft summary is deficient for a number of reasons:

- (a) First, the summary does not alert the voters as to the current law. The summary should state "current law prohibits manufacture, sale, delivery of misbranded food."
- (b) The summary does not make clear that a genetically engineered label must appear conspicuously on packages, display bins or shelves.
- (c) The summary does not adequately discuss the exemption in the act for "ready to eat food at bake sales or restaurants."
- (d) The summary does not adequately apprise the voters as to the enforcement mechanisms available under the proposed measure. It fails to mention that the Attorney General may bring actions to enjoin violations and that injured citizens may sue to enjoin knowing and intentional violations after notices are provided to the violator.

To correct these deficiencies, we suggest the following be substituted for the Attorney General's draft summary:

Ms. Kate Brown
January 28, 2014
Page 4

"Current law prohibits manufacture, sale, delivery of misbranded food. Measure expands 'misbranded' definition to include some food for that is entirely or partially produced with genetic engineering, unless conspicuously labeled 'genetically engineered' (for raw food) or 'produced with' / 'partially produced with' genetic engineering (for packaged food). Exempts food for animals; food produced without knowing or intentional use of genetic engineering; food provided ready to eat at bake sales, restaurants or cafeterias. Defines 'genetically engineered' as produced from organisms whose genetic material was changed through in vitro nucleic acid techniques, certain cell fusing techniques. Attorney General may bring action to enjoin violations. Injured citizens may sue to enjoin knowing and intentional violations after notice to state, violator; attorney fees available if citizen prevails. Other provisions."

We ask that you request of the Attorney General a certified ballot title addressing these criticisms.

Thank you for your courtesies and time concerning this matter.

Sincerely,

Davis Wright Tremaine LLP

John DiLorenzo, Jr.
JAD:rmp

cc: Terry Witt
Scott Dahlman

Certified by Attorney General on September 26, 2013.

BALLOT TITLE**Some genetically engineered food (defined) for retail sale
must be so labeled, or is "misbranded"**

Result of "Yes" Vote: "Yes" vote expands definition of "misbranded" food to include some genetically engineered food (defined) when not so labeled for retail sale; allows citizen enforcement lawsuits.

Result of "No" Vote: "No" vote retains current definition of "misbranded" as used in law prohibiting the misbranding of food and the manufacture, sale, or delivery of misbranded food.

Summary: Current law prohibits misbranding food; prohibits manufacture, sale, delivery of misbranded food. Measure expands definition of "misbranded" to include food for retail sale that is entirely or partially produced with genetic engineering, unless conspicuously labeled "genetically engineered" (for raw agricultural commodities) or "produced with"/ "partially produced with" genetic engineering (for processed food). Exempts certain foods from expanded definition of "misbranded." Defines "genetically engineered" food as food produced from organisms whose genetic material was changed through in vitro nucleic acid techniques, certain cell fusing techniques. Any injured citizen may bring lawsuit against manufacturer/supplier for failure to label processed foods, packaged raw agricultural commodities, or against retailer for failure to label unpackaged raw agricultural commodities, under certain circumstances; prevailing citizen may get attorney fees. Other provisions.

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2014 JAN 28 PM 12 35
KATE BROWN
SECRETARY OF THE STATE

ORDER CERTIFYING BALLOT TITLE

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,
Supreme Court Building, 1163 State Street, Salem, OR 97301-2563
Page 2 of 2

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on March 20, 2014, I directed the original Respondent's Answering Memorandum to Petitions to Review Ballot Title Re: Initiative Petition No. 44 (Supreme Court) to be electronically filed with the Appellate Court Administrator, Appellate Records Section; and served upon Steven C. Berman, attorney for petition Scott Bates; and served upon John DiLorenzo, Jr., attorney for petitioners Scott Dahlman and Terry Witt; by using the court's electronic filing system.

I further certify that on March 20, 2014, I directed the Respondent's Answering Memorandum to Petitions to Review Ballot Title Re: Initiative Petition No. 44 (Supreme Court) to be served upon Aurora Paulsen, chief petitioner, by mailing a copy, with postage prepaid, in an envelope addressed to:

Aurora Paulsen
SE Harney St
Astoria, OR 97103

/s/ Matthew J. Lysne

MATTHEW J. LYSNE #025422
Senior Assistant Attorney General
matthew.j.lysne@doj.state.or.us

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