IN THE SUPREME COURT OF THE STATE OF OREGON

ARTHUR TOWERS,

Petitioner,

v.

ELLEN ROSENBLUM, Attorney General, State of Oregon,

Respondent.

No. 61292

PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL FOR INITIATIVE PETITION NUMBER 9 (2014)

Petition to Review Ballot Title for Initiative Petition No. 9 for the General Election of November 4, 2014.

Ballot title certified by the Attorney General on April 23, 2013.

Chief Petitioners:

Jill Gibson Odell
NW Shadow Hills Lane
Beaverton, OR 97006

Libby Braeda
Espana Avenue N
Keizer, OR 97303

Steven C. Berman, OSB No. 951769
Stoll Stoll Berne Lokting
& Shlachter, P.C.
209 SW Oak Street, Fifth Floor
Portland, Oregon 97204
Telephone: (503) 227-1600
Facsimile: (503) 227-6840
Email: sberman@stollberne.com

Attorneys for Petitioner Arthur Towers

Ellen Rosenblum, OSB No. 753239
Attorney General of the State of Oregon
Douglas F. Zier, OSB No. 804174
Senior Assistant Attorney General
Office of the Solicitor General
400 Justice Building
1162 Court Street, N.E.
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Facsimile: (503) 378-6306
Email: ellen.rosenblum@doj.state.or.us
doug.zier@doj.state.or.us

Attorneys for Respondent

I. PETITIONER'S INTEREST IN THIS MATTER

Pursuant to ORS 250.085 and ORAP 11.30, petitioner Arthur Towers ("Towers") seeks review of the ballot title for Initiative Petition No. 9 for the General Election of November 4, 2014 (the "Initiative").[1] Towers is an elector in the State of Oregon who filed timely written comments concerning the draft ballot title with the Secretary of State pursuant to ORS 250.067(1).[2] Towers is dissatisfied with the ballot title certified by the Attorney General because the caption, results statements and summary do not substantially comply with the requirements of ORS 250.035(2).[3]

The ballot title shows a blatant disregard of this court's prior decisions. The ballot title does not inform voters that the Initiative would allow some public employees to become "free riders" who receive the benefits of union representation without paying for them. The ballot title also creates the false impression that under current law, public employees are required to join unions and pay dues. The court has addressed these issues repeatedly, and consistently has held that ballot titles similar to the one certified here are not statutorily compliant. *Sizemore v. Myers,* 342 Or 578, 157 P3d 188 (2007); *Novick v. Myers*, 333 Or 18, 36 P3d 464 (2001); *Bosak v. Myers*, 332 Or 552, 33 P3d 970

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[1]A copy of the Initiative is attached as Exhibit 1.

[2]A copy of the draft ballot title is attached as Exhibit 2. A copy of Tower's comments to the Secretary of State is attached as Exhibit 3.

[3]A copy of the Attorney General's response to Tower's comments is attached as Exhibit 4. A copy of the certified ballot title is attached as Exhibit 5. The ballot title was certified on April 23, 2013.

(2001); *Dale v. Kulongoski*, 321 Or 108, 894 P2d 462. The certified ballot title inexplicably ignores those opinions. The ballot title does not comply with the legal requirements, and must be revised.

II. THE INITIATIVE, THE DRAFT BALLOT TITLE, PETITIONER'S COMMENTS, AND THE CERTIFIED BALLOT TITLE

The Initiative would amend the Oregon Public Employee Collective Bargaining Act to allow public employees to receive the benefits of union representation without paying for them. *See* Initiative § 3(2) (amending ORS 243.662); Initiative §5(1)(c) (deleting the "fair-share" provision in ORS 243.672(1)(c)); Initiative § 5(1)(i) (making it an unfair labor practice for a public employer to enter into an agreement allowing for fair-share payments); Initiative §5(h) (making it an unfair labor practice for a public employee union to enter into an agreement allowing for fair-share payments). As a result, public employees in unionized bargaining units "who do not join a union [would] become 'free riders' by securing bargaining and representation services without cost." *Dale*, 321 Or 111-112 (footnote omitted).

The draft ballot title failed to identify topics that the court repeatedly has stated must be included in the ballot titles for similar measures. It was stunningly inconsistent with the court's decisions in *Dale* and *Sizemore*.[4] The

[4]For example, the draft caption provided, in part: "**Prohibits requiring** union membership as a condition of public employment." Ex. 2 (emphasis added). However, in *Dale*, the court held that the phrase "**ban requiring** public

draft ballot title conveyed, at best, non-familiarity with extant law and, at worst, hostility to it.

In his comments, Towers emphasized that the draft ballot title was woefully incompatible with *Dale* and *Sizemore*. Ex. 3. In response to the comments filed by Towers and other electors, the Attorney General removed the phrase "bans prohibiting" from the ballot title, but otherwise did little to make the title compliant. In his letter to the Secretary of State with the certified ballot title, the Assistant Attorney General responsible for this ballot title did not even acknowledge the court's past decisions or the long history of litigation over ballot titles for similar Initiatives. Ex. 4.

III. ARGUMENTS AND AUTHORITIES

A. The Caption for the Certified Ballot Title Does not Comply with the Requirements of ORS 250.035(2)(a).

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 is the "cornerstone for the other portions of the ballot title." *Kain v. Myers*, 333 Or 497, 502, 41 P3d 1076 (2002). The caption must accurately identify the subject matter of the proposed measure "in terms that will not confuse or mislead potential petition signers and voters." *Kain*, 333 Or

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employees to join union" was impermissible. 321 Or at 113-114 (emphasis added). Similarly, in Sizemore, the court held that "prohibits requiring" was impermissible. 342 Or at 586.

at 502 (citation omitted; internal quotation marks omitted). The caption, and ballot title, cannot "misstate, even by implication, the law that the proposal would enact." *Id.* (citations omitted; internal quotation marks omitted).

The caption for the certified ballot title provides:

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

Ex. 5. The caption is flawed, for the reasons set forth below.

The caption fails to inform voters that under the Initiative, public employees in unionized bargaining units with fair share agreements could become "free riders."[5] It is established Oregon law that if an initiative allows for free riders, that must be identified in the caption and throughout the ballot title. As the court explained in *Sizemore*:

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

[5]Public employee unions can negotiate "fair share" provisions in collective bargaining agreements for bargaining units that have chosen union representation. "Fair share" provisions require all covered employees to pay their proportional share of representation costs in lieu of dues. ORS 243.650(10), (18). In the absence of "fair share" provisions, public employees who are represented by public employee unions but who choose not to become union members would be "free riders"; they would receive the benefits of union representation without sharing in the costs of obtaining those benefits. *Dale*, 321 Or at 111-112; *Sizemore*, 342 Or at 588-589. "Fair share" provisions prevent the "free rider" problem. Some, but not all, public employee collective bargaining agreements in Oregon contain fair share provisions.

> the scope of the legal changes that the proposed measure would enact.' *Kain/Waller,* 337 Or at 40. The Attorney General must address that deficiency on referral."

342 Or at 588-589 (emphasis in original). The Initiative is similar to the initiative at issue in *Sizemore.* However, the caption fails to inform voters that the Initiative would allow for free riders. For that reason, the ballot title must be revised.

The phrase "[p]rohibits compulsory payment" in the caption is misleading and inaccurate. As a matter of law, fair share payments are not required. Public employee unions can seek to negotiate fair share provisions in collective bargaining agreements, but they are not mandated. Not all collective bargaining agreements contain fair share provisions. Accordingly, not all public employees in unionized bargaining units make fair share payments.[6] However, the caption erroneously implies that payment is "compelled" for all public employees in a collective bargaining unit that is represented by a union.

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[6]A majority of public employees in a bargaining unit can elect union representation for that bargaining unit. ORS 243.650, *et seq.* If a majority of employees chose union representation, the union has as an obligation to represent *all* employees in the bargaining unit, regardless of whether the employees join the union or not. *See, e.g., Sizemore*, 342 Or at 584-585 (discussing duty of fair representation). Existing law does not compel union membership or authorize unions to negotiate contracts that compel union membership. *See, e.g., id.* at 586 ("Oregon *public* sector law does not authorize the negotiation of contracts that compel bargaining unit members to become union members") (emphasis in original). *Dale*, 321 Or at 113 ("[w]ith respect to compulsory union membership, there is none").

The caption also creates a false impression that non-unionized public employees can be required to make payments in lieu of dues. Public employees in collective bargaining units may choose not to unionize. Those public employees are not represented by a union. Those non-unionized public employees do not pay union dues. Those non-unionized public employees will not make fair share payments, because they are not members of a collective bargaining unit that could negotiate a collective bargaining agreement that provides for payments in lieu of dues. For those public employees – members of a bargaining unit whose majority have chosen not to be represented by a union – no union representation costs are incurred and no payment for representation costs is made. Yet, the phrase "compulsory payment * * * by public employees choosing not to join union" falsely implies that non-unionized public employees are compelled to pay for representation costs for representation that they do not receive. That is misleading.

The court repeatedly has held that a ballot title cannot give the impression that union representation, or payment of dues, is compelled. *Sizemore*, 342 Or at 586 ("the Attorney General, in describing current law regarding public sector employment, cannot suggest correctly that a negotiated contract may **compel** public employees to join a union") (emphasis added); *Dale*, 321 Or at 113 ("[t]he phrase 'ban requiring' can be read to imply that

compulsory *union membership* presently is *required* by law and that the measure bans that requirement") (italics in original; bold added); *Novick*, 333 Or at 25 ("[t]he Attorney General's use of the term 'requires' in the ballot title caption inaccurately suggests that the proposed measure would obligate employees to accept union representation"). Despite those repeated and unequivocal holdings, the Attorney General certified a ballot title that creates the false impression that representation and membership can be compelled. For that additional reason, the ballot title must be revised.

Finally, the caption is deficient for the additional reason that it fails to inform voters that the Initiative creates new unfair labor practices. The court required the ballot title at issue in *Sizemore* to contain similar information. The creation of two new unfair labor practices "represent[s] major changes in Oregon law that likely would be significant to the voting public." *Sizemore*, 342 Or at 588 (citation omitted; internal quotation marks omitted). The new unfair labor practices are not "mere procedural details" but, rather, the enforcement mechanism for the Initiative. *Id.* (citation omitted; internal quotation marks omitted). They are "an important aspect of the subject matter of the proposed measure" that must be included in the caption. *Id.*

For the reasons set forth above, the caption does not comply with the requirements of ORS 250.035(2)(a) and must be revised.

B. The Results Statements Do Not Comply with the Requirements of ORS 250.035(2)(b) and (c).

ORS 250.035(2)(b) and (c) require that the ballot title contain "simple and understandable statement[s] of not more than 25 words that describe[ ] the result if the state measure is" approved or rejected. The results statements reiterate the inaccuracies contained in the caption and also must be revised.

C. The Summary Does Not Comply with the Requirements of ORS 250.035(2)(d).

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." The summary contains the flaws discussed above. The summary fails to set forth that the Initiative would allow for "free riders" and require unions to bear the cost of representing non-members who are part of a unionized bargaining unit.

The summary also misstates, or creates confusion, about existing law. The summary refers to fair share payments as "compulsory," although fair share payments are not mandated by current law. The summary retains the false impression that under current law, workers in a collective bargaining unit who are not unionized could still be subject to fair share payments. The summary fails to set forth that unionized workers can deauthorize; that is essential background, because the advocates for the Initiative incorrectly assert that fair

share payments are "compulsory." The statement – "[m]easure affirms public employees' right to join or decline to join union" – is not a "major effect" of the measure. Public employees already have that choice. "Affirming" an existing "right" is political rhetoric from the Initiative's recitals that does not belong in a ballot title. *Mabon v. Myers*, 332 Or 633, 638 n 2, 33 P3d 988 (2001). Finally, the use of the word "only" is the second to last sentence is misleading. *See* Ex. 5 ("[m]easure applies **only** to new, renewed, or extended contracts entered into after the effective date of the measure") (emphasis added). The Initiative would apply to all future collective bargaining agreements and to the renewal or extension of any existing collective bargaining agreements. Initiative, § 6. "Only" miscasts the sweep of the Initiative.

IV. REQUEST FOR COURT TO CERTIFY BALLOT TITLE

The Attorney General's disregard of the statutory standards – and this court's established case law – raises significant concerns that the Assistant Attorney General working on this matter does not intend to comply with existing law.[7] This a unique instance where the public and the parties would be

[7]Towers and other commenters encouraged the Assistant Attorney General responsible for this ballot title to certify a ballot title that paralleled the language for the modified ballot title for Initiative Petition 48 (2012). That was the Initiative at issue in *Sizemore*. The court ultimately held that modified ballot title to be legally compliant. Had the Attorney General simply followed existing precedent, party and judicial resources would have been conserved.

best served by the court certifying a ballot title, rather than referring the ballot title to the Attorney General for modification.

V. CONCLUSION

The caption, results statements and summary in the certified ballot title do not substantially comply with the requirements of ORS 250.035. Towers respectfully requests that the court certify to the Secretary of State a ballot title that complies with the requirements of ORS 250.035 in lieu of the ballot title certified by the Attorney General or, alternatively, refer the ballot title to the Attorney General for modification.

DATED this 7th day of May, 2013.

Respectfully submitted.

By:
Steven C. Berman, OSB No. 951769
STOLL STOLL BERNE LOKTING
& SHLACHTER, PC

Attorneys for Petitioner

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

SECTION 2. The people of Oregon find that:

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

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

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

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

SECTION 3. ORS 243.662 is amended to read:

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

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

SECTION 4. ORS 243.666 is amended to read:

243.666. (1) A labor organization certified by the Employment Relations Board or recognized by the public employer is the exclusive representative of the employees of a public employer for the purposes of collective bargaining with respect to employment relations. [*Nevertheless any agreements entered into involving union security including an all-union agreement or agency shop agreement must safeguard the rights of nonassociation of employees, based on bona fide religious tenets or teachings of a church or religious body of which such employee is a member. Such employee shall pay an amount of money equivalent to regular union dues and initiation fees and assessments, if any, to a nonreligious charity or to another charitable organization mutually agreed upon by the employee affected and the representative of the labor organization to which such employee would otherwise be required to pay dues. The employee shall furnish written proof to the employer of the employee that this has been done.*]

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

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

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

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

SECTION 5. 243.672 is amended to read:

243.672. (1) It is an unfair labor practice for a public employer or its designated representative to do any of the following:

(a) Interfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662.

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

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

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

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

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

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

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

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

(2) Subject to the limitations set forth in this subsection, it is an unfair labor practice for a public employee or for a labor organization or its designated representative to do any of the following:

(a) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under ORS 243.650 to 243.782.

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

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

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

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

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

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

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

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

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

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

DRAFT BALLOT TITLE

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

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

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

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

STOLL BERNE
STOLL STOLL BERNE LORTING & SHLACHTER P.C. LAWYERS

Steven C. Berman
sberman@stoliberne.com

April 8, 2013

RECEIVED
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KATE BROWN
SECRETARY OF THE STATE

VIA FACSIMILE

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

Re: Draft Ballot Title for Initiative Petition No. 9 for the General Election of November 4, 2014

Dear Secretary Brown:

I represent Arthur Towers, Political Director for SEIU Local 503, regarding the ballot title for Initiative Petition No. 9 for the general election of November 4, 2014 ("the Initiative"). Mr. Towers is an elector in the State of Oregon. This letter is written in response to your office's press release, dated March 25, 2013, which invites comments on the draft ballot title for the Initiative.

It is Mr. Tower's position that the caption, results statements and summary of the draft ballot title for the Initiative do not comply with the requirements of ORS 250.035(2). A similar ballot title for a similar initiative was rejected by the Oregon Supreme Court in *Sizemore v. Myers*, 342 Or 578, 157 P3d 188 (2007). As the Court made clear in *Sizemore*, when an initiative would allow public employees "to refuse to pay for the cost of union representation services that the union must provide to all employees," the ballot title must so inform the voters. *Sizemore*, 342 Or at 589. *See also Dale v. Kulongoski*, 321 Or 108, 111-112, 894 P2d 462 (1995) (ballot title must convey that "measure, if adopted, would entitle public employees who do not join a union to become 'free riders'"). The ballot title for the Initiative does not do that. It is insufficient and must be revised for that and other reasons.

I. An Overview of Initiative Petition 9

The Initiative would amend the Oregon Public Employee Collective Bargaining Act. The Initiative would change Oregon law to allow public employees to receive the benefits of union representation without paying for them. *See* Initiative § 3(2) (amending ORS 243.662); Initiative §5(1)(c) (deleting the "fair-share" provision in ORS 243.672(1)(c)); Initiative § 5(1)(i) (making

209 SW Oak Street, Suite 500 Portland, OR 97204 Tel (503) 227-1600 Fax (503) 227-6840

it an unfair labor practice for a public employer to enter into an agreement allowing for fair-share payments); Initiative §5(h) (making it an unfair labor practice for a public employee union to enter into an agreement allowing for fair-share payments). The Initiative would apply to all future collective bargaining agreements and the renewal or extension of any existing collective bargaining agreements. Initiative, § 6.

II. The Draft Ballot Title for the Initiative Does Not Comply with the Statutory Requirements.

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, 258 P3d 1194 (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 wording of the caption should set forth the "limited extent" to which an initiative will revise current law. *Brady v. Kroger*, 347 Or 518, 524, 225 P3d 36 (2009). A caption that is incorrect, or inaccurate, is not statutorily compliant. *Towers v. Myers*, 341 Or 357, 362, 142 P3d 1040 (2006).

The caption in the draft ballot title provides:

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

Mr. Towers submits that both phrases in the caption are flawed. "Prohibits requiring union membership as condition of public employment" misstates current law. "[P]rohibits requiring 'fair share' fee payments" does not adequately convey that the Initiative would allow employees to receive the benefit of union representation without paying for that representation.

Sizemore and *Dale* are dispositive. In *Dale*, the Court reviewed the ballot title for an initiative that would have prohibited fair share agreements. 321 Or at 112. The Court held that the phrase "ban requiring public employees to join unions" was not statutorily compliant, because it reasonably could "be read to imply that compulsory *union membership* presently is *required* by law and that the measure bans that requirement." *Id.* at 113 (emphasis in original). *See also id.* at 113-114 (voters could be misled "into believing that the law now requires union membership for all public employees. That is not accurate."). In *Sizemore*, the Court applied its analysis in *Dale* and held that the term "prohibits * * * requiring" was misleading, because it "falsely suggest[s] that current law permits compulsory union membership." 342 Or at 585. The Court was explicit. It stated, in no ambiguous terms, "the Attorney General, in describing current law regarding public sector employment, cannot suggest correctly that a negotiated contract may compel public employees to join a union." *Id.*

The phrase "[p]rohibits requiring union membership as condition of public employment" in the draft ballot title for the Initiative is unacceptable for the same reason "ban[s] requiring public employees to join unions" was unacceptable in *Dale* and "prohibits * * * requiring" was unacceptable in *Sizemore*. "Prohibits requiring union membership as condition of public employment" improperly implies that union membership presently is required by law. It is not. *Dale*, 321 Or at 113; *Sizemore*, 342 Or at 586. The first phrase in the caption is inaccurate. The case law is both well-settled and clear. That phrase must be eliminated from the caption and throughout the ballot title.

The second phrase in the caption – "prohibits requiring fair share fee payments" – understates the true subject of the Initiative, uses legalese that would be incomprehensible to voters, and is misleading. As with the initiative at issue in *Sizemore*, "the most significant result of enactment will be that nonmembers of a union will be entitled to refuse to pay for the cost of union representation services that the union must provide to all employees." 342 Or at 589. *See also id.* at 588 ("[t]he proposed measure * * * will entitle employees to receive the union's legally mandated representation services without sharing in the cost of those services"); *Dale*, 321 Or at 111-112 ("the measure, if adopted, would entitle public employees who do not join a union to become 'free riders' by securing bargaining and representation services without cost") (footnote omitted). Yet, the challenged phrase fails to convey the "free rider" issue. As was made clear in *Sizemore* and *Dale*, voters must be informed that the Initiative would allow public employees to receive representation benefits without paying for them. Accordingly, the second phrase in the caption understates the scope of the Initiative, and must be revised. *Sizemore*, 342 Or at 588-589.

The second clause is flawed for the additional reason that it uses the phrase "fair share fee payments." "Fair share" is a legal term of art. The statutory definition of "fair share" is over 190 words long. *See* ORS 243.650(10) (defining "fair share"). The Court in *Dale* needed 40 words, plus a separate footnote, to explain the concept of a "fair share agreement." 321 Or at 111 & n 3. While "fair share" is a term used by legislators, in Court opinions discussing the intricacies of labor law and by labor law practitioners, it is not a term generally known to the public. Accordingly, it should not be included in the caption. *See, e.g., Terhune v. Myers*, 342 Or 136, 141, 149 P3d 1139 (2006) ("use of unfamiliar or technical terms" may cause a ballot title "to run afoul" of statutory requirements). Moreover, referring to a fair share payment as a "fee" improperly implies that the payment is punitive. The word "fee" fails to conveys that employees who make fair share payments receive the benefits of union representation.

Finally "prohibits requiring" is inaccurate. Current law allows any employee with a *bona fide* religious objection to refuse to make a fair share payment. ORS 243.666(1). "Prohibits requiring fair share fee payments" is misleading because it incorrectly implies that fair share payments are mandatory as to all public employees, when they are not. That inaccuracy is heightened by the fact that the initiative eliminates the religious exemption. Initiative, § 4(1). In other words, the caption currently implies that there is no exception (when there is an exception) *and* fails to mention that the exception would be eliminated.

The caption is deficient for the additional reason that it fails to inform voters that the Initiative creates new unfair labor practices, and thus revises the existing restrictions in the Public Employees Collective Bargaining Act. The Court required the ballot title at issue in *Sizemore* to contain similar information. The creation of two new unfair labor practices "represent major changes in Oregon law that likely would be significant to the voting public." *Sizemore*, 342 Or at 588. The new unfair labor practices are not "mere procedural details" but, rather, the enforcement mechanism for the Initiative. *Id.* They are "an important aspect of the subject matter of the proposed measure" that must be included in the caption. *Id.*

B. The Results Statements

ORS 250.035(2)(b)&(c) require that the "yes" and "no" statements in a ballot title contain "simple and understandable statement[s] of not more than 25 words that describe[ ] the result if the state measure is" passed or rejected. The results statements in the draft ballot title provide:

> "Yes" vote prohibits requiring union membership as a condition of public employment; prohibits requiring 'fair share' fees from public employees who choose not to join union.
>
> "No" vote retains laws allowing all-union agreements with public employees, including required payment of 'fair share' fees by employees choosing not to join unions.

The yes and no statements should be revised for the reasons set forth above. The no statement should be revised for the additional reason that it is inaccurate. Current law does not "allow[] all-union agreements with public employees." There is no such thing as an "all-union agreement with public employees." Public employers negotiate agreements with recognized labor organizations. ORS 243.662; *Sizemore*, 342 Or at 584. But, "*public* sector labor law does not authorize the negotiation of contracts that compel bargaining unit members to become union members." *Sizemore*, 342 Or at 586 (emphasis in original). The no statement flatly misstates current law. Finally, the no statement fails to state that current law contains a religious exemption.

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." Towers submits that the summary should be revised for the reasons set forth above. The summary should be revised for the following additional reasons.

- The description of current law uses a series of terms and phrases are not generally known, and does not place those terms in any meaningful context for the voter. For example, the summary does not clarify for voters that a union can act as an exclusive bargaining representative only if the workplace employees vote for representation. The summary

does not explain that employees may opt out of the union. The summary does not provide that a union must bargain for and represent all employees, whether those employees are members or not.

- The second sentence – "measure affirms the right of public employees to join union if they choose" – is both unnecessary and misleading. It implies that union membership could be compulsory, when it cannot be.

- The third sentence again incorrectly implies that union membership can somehow be mandated. It also uses the politically loaded phrase "right to work." That phrase has no defined meaning. However, it is a phrase used by anti-union activists. *See, e.g.*, Initiative Petition 48 (2008), § 1 (initiative at issue in *Sizemore*, which proponents entitled "the Oregon Right to Work Act"). Because the phrase is politically charged, it should not be included in the title. *See, e.g., Dirks v. Myers*, 329 Or 608, 616, 993 P2d 808 (2000) ("[t]o avoid the potential to mislead voters, we have resisted attempts to incorporate into the ballot title caption terms or phrases in a measure that * * * tend more to promote or defeat passage of the measure than to describe its substance accurately").

- The fifth sentence is misleading. The phrase "[m]easure does not apply to existing contracts" is inaccurate. The Initiative, by its own terms, applies to renewals and extensions of current agreements. Initiative, § 6. Moreover, the word "only" downplays the broad sweep of the Initiative. The Initiative would apply to *all* renewals and extensions of current agreements and to all new agreements.

- The summary altogether fails to mention that the Initiative creates new unfair labor practices.

III. CONCLUSION

The ballot title does not comply with the requirements of ORS 250.035(2) and must be revised. Because the issues presented here already have been litigated in *Sizemore* and *Dale*, the ballot titles for the initiatives at issue in that case provide controlling guidance on how the Attorney General should proceed here. Towers submits that the Attorney General can cure the multiple deficiencies in the draft ballot title by certifying a ballot title which parallels the modified ballot title for Initiative Petition 48 (2008).

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

Steven C. Berman

SCB:jjs
cc: client

ELLEN F. ROSENBLUM
Attorney General

MARY H. WILLIAMS
Deputy Attorney General

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

April 23, 2013

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

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

Dear Mr. Trout:

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

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

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

The Caption

The draft caption provides:

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

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

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

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

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

We have modified the draft caption and certify the following:

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

The "Yes" Result Statement

The draft "Yes" result statement provides:

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

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

We certify the following "Yes" result statement:

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

The "No" Result Statement

The draft "No" result statement provides:

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

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

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

We certify the following "No" result statement:

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

The Summary

The draft summary provides:

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

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

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

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

We certify the following summary:

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

Conclusion

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

Sincerely,

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

DFZ:mlk/4134254

Enclosure
Lynn Rosik, General Counsel Division

Jill Gibson Odell
NW Shadow Hills Lane
Beaverton, Oregon 97006

Braeda Libby
5 Espana Avenue N.
Keizer, Oregon 97303

Gary I
11125 SW Tanager Terrace
Beaverton, Oregon 97007

Jill Gibson Odell
Gibson Law Firm
Lincoln Tower
10260 SW Greenburg Rd., Ste. 1180
Portland, Oregon 97223

Richard H.
3411 NW Vaughn Street
Portland, Oregon 97210

Margaret S. Olney
Bennett, Hartman, Morris & Kaplan, LLP
210 SW Morrison St., Suite 500
Portland, Oregon 97204

Aruna A. Masih
Bennett, Hartman, Morris & Kaplan, LLP
210 SW Morrison St., Suite 500
Portland, Oregon 97204

Steven C.
Stoll Berne
209 SW Oak St., Ste 500
Portland, Oregon 97204

Eric
30710 SW Magnolia Avenue
Wilsonville, Oregon 97070

Certified by Attorney General on April 23, 2013.

BALLOT TITLE

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

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

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

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

CERTIFICATE OF FILING AND PROOF OF SERVICE

I hereby certify that on May 7, 2013, I electronically filed the original PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL FOR INITIATIVE PETITION NO. 9 (2014), and accompanying exhibits, with the Appellate Court Administrator.

I further certify that on May 7, 2013, I served two (2) copies of the foregoing PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL FOR INITIATIVE PETITION NO. 9 (2014), and accompanying exhibits, by regular first class mail on:

Ellen Rosenblum
Attorney General of the State of Oregon
Douglas F. Zier, OSB No. 804174
Senior Assistant Attorney General
Office of the Solicitor General
400 Justice Building
1162 Court Street, N.E.
Salem, OR 97301-4096

Respondent

Jill Gibson Odell
NW Shadow Hills Lane
Beaverton, OR 97006

Libby Braeda
Espana Avenue N.
Keizer, OR 97303

Chief Petitioners

Kate Brown
Secretary of State
141 State Capitol
900 Court Street NE
Salem, OR 97301

I further certify that on May 7, 2013, I served a copy of the foregoing PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL FOR INITIATIVE PETITION NO. 9 (2014), and accompanying exhibits, by email on:

Douglas F. Zier, OSB No. 804174
Senior Assistant Attorney General
Email: doug.zier@doj.state.or.us

DATED this 7th day of May, 2013.

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.

By: _____
Steven C. Berman, OSB No. 95176

Attorneys for Petitioner Arthur Towers