



**DEPARTMENT OF JUSTICE**  
APPELLATE DIVISION

January 21, 2014

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

Re: *Dan Harmon v. Ellen F. Rosenblum, Attorney General, State of Oregon*  
SC S061930

Dear Chief Justice Balmer:

Petitioner Dan Harmon has filed a ballot title challenge 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. Preusch

Matthew J Preusch  
Assistant Attorney General  
Matthew.J.Preusch@doj.state.or.us

MJP:chc/4924117

cc: Jill Gibson Odell/without encl.  
Arthur Towers/without encl.

IN THE SUPREME COURT OF THE STATE OF OREGON

DAN HARMON,

Petitioner,

v.

ELLEN F. ROSENBLUM, Attorney  
General, State of Oregon,

Respondent.

Supreme Court No. S061930

RESPONDENT'S ANSWERING  
MEMORANDUM TO PETITION TO  
REVIEW BALLOT TITLE RE:  
INITIATIVE PETITION NO. 36  
(SUPREME COURT)

Petitioner seeks review of the Attorney General's ballot title for Initiative Petition (IP) #36 (2014). That measure amends the constitution to prohibit laws that restrict the ability of employers and employees to negotiate payroll deductions. It prohibits laws that, among other things, restrict which employees may use payroll deductions, which employers may make deductions available, to whom those payroll deductions may be directed, how those deductions may be spent, and the use of deductions to require non-union members to pay for union representation services that they receive. That final category of deduction is known as a "fair share" agreement, a type of union security agreement.<sup>1</sup>

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<sup>1</sup> This court has identified five types of union security agreements: "the closed shop, union shop, agency shop, fair share clauses, and maintenance-of-membership clauses." *Stines v. Oregon State Employees Ass'n*, 287 Or 643, 646 n 1, 601 P2d 799 (1979). A fair share agreement, which this measure applies to, "is defined as one where nonmembers of the union are required to

Petitioner objects to the ballot title's caption, result statements, and summary, arguing that they fail to inform voters that IP 36 "would prohibit two types of law: laws that restrict the ability to negotiate and use payroll deductions and laws that restrict the ability to negotiate and enter into union security agreements." (Pet 3). Petitioner is mistaken. Deductions made pursuant to union security agreements are just one category of payroll deductions that the measure protects. Therefore, petitioner is incorrect that the measure prohibits "two types of laws." Given that petitioner's argument is based on that faulty premise and the ballot title otherwise sufficiently informs voters of the initiative's impact, this court should conclude that the ballot title substantially complies with statutory requirements and approve it without modification.

**A. Union security agreements are one way that payroll deductions may be used.**

IP 36 consists of five sections, but only the first two are relevant to this petition. The texts of those sections demonstrate that deductions pursuant to

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make payment-in-lieu-of-dues to the union." *Id.* at 650; *see also* ORS 243.650 (10) ("Fair-share agreement' means an agreement between the public employer and the recognized or certified bargaining representative of public employees whereby employees who are not members of the employee organization are required to make an in-lieu-of-dues payment to an employee organization except as provided in ORS 243.666.")

union security agreements are one type of payroll deduction agreement that this measure applies to. The caption, result statements, and summary accurately reflect that.

Section 1 of IP 36 states that “[n]o law shall restrict the ability of employers and employees \* \* \* to negotiate and agree upon terms governing *payroll deductions*.” (Emphasis added). Section 2 then provides a non-exclusive list of the “type of laws prohibited by Section 1[.]” Because Section 1 only applies to payroll deduction agreements, the “types of laws” it prohibits must necessarily be laws relating to different forms of payroll deductions. Payroll deductions under union security agreements, which are described in Section 2(5), are therefore one type of payroll deduction agreement the measure impacts; Section 2(5) does not, as petitioner argues, have “nothing to do with payroll deductions[.]” (Pet. 3). Moreover, this court has recognized that union security agreements are one way that payroll deductions may be used. *See Stines*, 287 Or at 645 (discussing “payroll deductions for union dues” as form of union security agreement). Because under the terms of IP 36 and Oregon law union security agreements are one use of payroll deductions, the measure does not, as petitioner argues, relate to “two types” of laws.

**B. The Attorney General’s summary substantially complies with ORS 250.035(2)(d).**

While petitioner challenges all the parts of the ballot title, he does so on essentially the same ground: the alleged failure to mention or more fully describe union security agreements. (*See* Pet 4 (“failure to mention this subject matter renders the caption underinclusive and inaccurate”); Pet 5 (“Yes” statement deficient “for the same reason”); Pet 5 (“No” statement deficient “for the same reason”); Pet 6 (summary deficient “for the reasons stated”).) Petitioner is incorrect.

This court reviews the Attorney General’s certified ballot title to determine whether it “substantially complies” with the requirements of ORS 250.035(2)(a) to (d). *Christ v. Myers*, 339 Or 494, 496, 123 P3d 271 (2005). A ballot title caption must contain “not more than 15 words that reasonably identif[y] the subject matter of the state measure.” ORS 250.035(2)(a). A caption “reasonably identifies” a proposed measure's subject matter, as ORS 250.035(2)(a) requires, if “it states or describes the subject accurately and in terms that will not confuse or mislead potential petition signers and voters.” *Greene v. Kulongoski*, 322 Or 169, 174-75, 903 P2d 366 (1995). A “Yes” statement must notify “petition signers and voters of the result or results of enactment that would have the greatest importance to the people of Oregon.”

*Berman v. Kroger* 347 Or 509, 513, 225 P3d 32 (2009) (internal quotation and

citation omitted). A “No” statement must be a “simple and understandable statement that describes the result if the measure is rejected \* \* \*.” *Sizemore v. Kulongoski*, 322 Or 229, 236, 905 P2d 1146 (1995). Finally, the summary must “disclose in greater detail the proposed measure’s major effects” including “additional important consequences or details that the result statement does not convey and helpful contextual information about the impact of the proposed measure on existing law.” *Novick v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004).

This ballot title meets all of those requirements. First, the caption reasonably identifies the measure’s subject matter because it accurately states its breadth: it would prohibit laws that relate to payroll deductions. Adopting petitioner’s suggestion could “confuse or mislead” voters by suggesting that union security agreements are the major subject of the measure when, as the measure’s text shows, those agreements are just one of the five non-exclusive categories described in Section 2. While payroll deductions pursuant to union security agreements are an important part of the measure, to mention them and omit the other four categories would be misleading.

Second, the “Yes” statement accurately informs voters that the measure’s prohibition would apply to laws restricting the use of “payroll deductions for

several purposes.” That signals that the measure’s broad scope, which the summary describes with further specificity.

Third, the “No” statement succinctly and accurately explains what would happen if voters reject the measure: it would retain existing law, which does not expressly prohibit payroll deduction agreements. That is an accurate statement of the status quo, and petitioner does not suggest otherwise.

Fourth and finally, petitioner argues that the summary is invalid because it does not inform “voters that union security agreements would receive constitutional protections under IP 36.” (*Id.*) The summary does not inform voters of that because the measure is broader than that. As explained above, the measure grants constitutional protection to payroll deductions, one potential use of which is “fair share” agreements. The summary captures that. (*See* Pet 2 (measure prohibits laws restricting “deductions under ‘fair share’ agreements (requiring union-represented employees, including non-union members, to pay for union representation services they receive).”)).

For all of those reasons, the ballot title substantially complies with the requirements of ORS 250.035.

## CONCLUSION

The court should approve the Attorney General's ballot title for IP #36 (2014) without modification.

Respectfully submitted,

ELLEN F. ROSENBLUM #753239  
Attorney General  
ANNA M. JOYCE #013112  
Solicitor General

/s/ Matthew J Preusch

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MATTHEW J PREUSCH #134610  
Assistant Attorney General  
Matthew.J.Preusch@doj.state.or.us

Attorneys for Plaintiff-Respondent  
Ellen F. Rosenblum, Attorney General,  
State of Oregon



OFFICE OF THE SECRETARY OF STATE

KATE BROWN  
SECRETARY OF STATE



ELECTIONS DIVISION

JIM WILLIAMS  
DIRECTOR  
255 CAPITOL STREET NE, SUITE 501  
SALEM, OREGON 97310-0722  
(503) 986-1518

January 8, 2014

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

Re: Jill Gibson Odell 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 #36. We also enclose the draft and certified ballot titles with their respective transmittal letters.

Sincerely,

Lydia Plukchi  
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 4, 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 Arthur Towers

Residence Address, Street/Route  
1500 SW Park Ave, #211

City Portland	State Oregon	Zip Code 97201
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Mailing Address if different, Street/Route  
813 SW Alder St, Suite 800A

City Portland	State Oregon	Zip Code 97205
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Email Address and/or Website	Day Phone Number 503-239-8029	Sponsoring Organization if any
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Name print \_\_\_\_\_ Signature \_\_\_\_\_

2 Residence Address, Street/Route

City	State	Zip Code
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Mailing Address if different, Street/Route

City	State	Zip Code
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Email Address and/or Website	Day Phone Number	Sponsoring Organization if any
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Name print \_\_\_\_\_ Signature \_\_\_\_\_

3 Residence Address, Street/Route

City	State	Zip Code
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Mailing Address if different, Street/Route

City	State	Zip Code
------	-------	----------

Email Address and/or Website	Day Phone Number	Sponsoring Organization if any
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please read the instructions for circulators and signers on the reverse side

**SEL 310**

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OCT 10 PM 3 31  
KATE BROWN  
SECRETARY OF THE STATE

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

rev 1/12, ORS 260.045, ORS 250.165, ORS 265.165, ORS 265.135

### 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

Protect Workers' Rights to Contribute

Signed

10-10-13  
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 260.045, ORS 250.165, ORS 265.165, ORS 265.135

### 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

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.

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2013 OCT 10 PM 3 31  
KATE BROWN  
SECRETARY OF THE STATE

## Protect Workers' Rights to Contribute

The People amend the Constitution as follows:

Section 1. No law shall restrict the ability of employers and their employees (either individually or through their bargaining representative) to negotiate and agree upon terms governing payroll deductions.

Section 2. The type of laws prohibited by Section 1 include any laws that restrict (1) the category of employees who may use payroll deduction; (2) the category of employers who may make payroll deduction available; (3) the persons or entities to whom the payroll deduction may be directed; (4) the purposes for which funds from payroll deduction may be used, such as charitable, political or union-related deductions; or (5) the ability to require all union-represented employees to pay for representation services they receive and the union is required to provide.

Section 3. Nothing in this amendment requires any employer to make payroll deduction available to employees.

Section 4. Nothing in this amendment repeals or affects any laws in effect as of January 1, 2014.

Section 5. Nothing in this amendment affects any laws relating to the payment or collection of child support, spousal support or other garnishments through wage withholding or payroll deduction.

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2013 OCT 10 PM 3 31  
KATE BROWN  
SECRETARY OF THE STATE

ELLEN F. ROSENBLUM  
Attorney General



MARY H. WILLIAMS  
Deputy Attorney General

DEPARTMENT OF JUSTICE  
APPELLATE DIVISION

November 20, 2013

Gina Zejdlik  
Acting Director, Elections Division  
Office of the Secretary of State  
141 State Capitol  
Salem, OR 97310

Re: Proposed Initiative Petition — Amends Constitution: Prohibits Laws That Restrict  
Negotiations between Employers and Employees for the Use of Payroll Deductions  
DOJ File #BT-36-13; Elections Division #36

Dear Ms. Zejdlik:

We have prepared and hereby provide to you a draft ballot title for the above-referenced prospective initiative petition. The proposed measure relates to amending the constitution to prohibit laws that restrict employers' and employees' ability to negotiate for the use of payroll deductions.

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,

Cameron Craft  
Legal Secretary

chc/4799832

Enclosure

Arthur Towers  
813 SW Alder St. Suite 800A  
Portland, OR 97205

RECEIVED  
2013 NOV 20 PM 2 54  
KATE BROWN  
SECRETARY OF THE STATE

## **DRAFT BALLOT TITLE**

**Amends Constitution: Prohibits laws that restrict negotiations between employers and employees for the use of payroll deductions**

**Result of "Yes" Vote:** "Yes" vote amends the constitution to prohibit laws that restrict employers' and employees' ability to negotiate for the use of payroll deductions for any purpose.

**Result of "No" Vote:** "No" vote rejects constitutional amendment; retains existing law; no prohibitions on laws restricting ability to negotiate for the use of payroll deductions.

**Summary:** Amends constitution. Current law allows employees and employers to negotiate to use payroll deductions for financial contributions. The constitution does not expressly prohibit laws that restrict those negotiations. Measure amends constitution to prohibit laws that would restrict the categories of employers or employees that may use payroll deductions; the persons or entities to whom those deductions may be directed; purposes for which deducted funds may be used, including charitable, political, or union-related; or the ability to require union-represented employees, including non-union members, to pay for representation services. Measure does not require employers to make payroll deductions available to employees, does not repeal existing laws, and does not affect laws relating to collection of child or spousal support through wage withholding or deductions.

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2013 NOV 20 PM 2 54  
KATE BROWN  
SECRETARY OF THE STATE



December 5, 2013

Via Facsimile - (503) 373-7414

The Honorable Kate Brown  
Secretary of State  
Elections Division  
255 Capitol Street NE, Ste 501  
Salem, OR 97310-0722

RECEIVED  
2013 DEC 5 PM 1 36  
KATE BROWN  
SECRETARY OF THE STATE

Re: Public Comment on Initiative Petition #36 (2014)

Dear Secretary Brown,

I represent Dan Harmon, who is an elector in the State of Oregon and wishes to comment on the draft ballot title for IP #36 (2014). The Attorney General has proposed the following ballot title for IP #36:

**Amends Constitution: Prohibits laws that restrict negotiations between employers and employees for the use of payroll deductions**

**Result of "Yes" Vote:** "Yes" vote amends the constitution to prohibit laws that restrict employers' and employees' ability to negotiate for the use of payroll deductions for any purpose.

**Result of "No" Vote:** "No" vote rejects constitutional amendment; retains existing law; no prohibitions on laws restricting ability to negotiate for the use of payroll deductions.

**Summary:** Amends constitution. Current law allows employees and employers to negotiate to use payroll deductions for financial contributions. The constitution does not expressly prohibit laws that restrict those negotiations. Measure amends constitution to prohibit laws that would restrict the categories of employers or employees that may use payroll deductions; the persons or entities to whom those deductions may be directed; purposes for which deducted funds may be used, including charitable, political, or union-related; or the ability to require union-represented employees, including non-union members, to pay for representation services. Measure does not require employers to make payroll deductions available to employees, does not repeal existing laws, and does not affect laws relating to collection of child or spousal support through wage withholding or deductions.

Elections Division  
December 5, 2013  
Comments on IP 36  
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## I. CAPTION

ORS 250.035(2)(a) requires a ballot title to contain "[a] caption of not more than 15 words that reasonably identifies the subject matter of the state measure." To comply with this standard, case law requires that the caption identify the proposal's subject matter in terms that will not "confuse or mislead potential signers and voters." *Kain/Waller v. Myers*, 337 Or 36, 40 (2004). The Oregon Supreme Court recently emphasized that the "subject matter" is the "actual major effect" of the measure. *Lavey v. Kroger*, 350 Or 559 563 (2011). If a draft ballot title is challenged for failure to comply with these requirements, upon review the Oregon Supreme Court's "initial task is to determine whether the title prepared by the Attorney General is unfair or insufficient." *Remington v. Paulus*, 296 Or 317, 320 (1984).

The draft caption does not meet these statutory requirements because it excludes one of the subject matters of the measure: union security agreements, also known as "fair share agreements."<sup>1</sup> IP 36 would provide constitutional protections not only to payroll deductions (Section 2 (1) – (4)), but also to union security agreements (Section 2 (5)). Therefore, the caption is underinclusive, and, thus, inaccurate, because it only identifies payroll deductions as a subject matter of the measure and omits the other subject matter – union security agreements.

Because the draft ballot title does not comply with statutory requirements, we propose the following caption:

**Amends Constitution: Prohibits laws that restrict employment negotiations regarding use of payroll deductions and union security agreements**

Or

**Amends Constitution: Prohibits laws that restrict employment negotiations regarding use of payroll deductions and fair share agreements**

## II. RESULT OF "YES" VOTE

ORS 250.035(2)(b) requires that a ballot title contain a "simple and understandable statement," 25 words long, explaining what will happen if the measure is approved. The purpose of this portion of the ballot title is to "notify petition signers and voters of the results of enactment that would have the greatest importance to the people of Oregon." *Novick v. Myers*, 337 Or 568, 574 (2004).

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<sup>1</sup> ORS 243.650 (10) defines "fair-share agreement" as "an agreement between the public employer and the recognized or certified bargaining representative of public employees whereby employees who are not members of the employee organization are required to make an in-lieu-of-dues payment to an employee organization." This statute also refers to such agreements as "union security agreements."



Elections Division  
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The draft "yes" statement does not meet this requirement for the same reason as discussed above – because it does not notify voters that the measure would protect negotiations regarding union security agreements. To address this defect, we suggest the following statement:

**Result of "Yes" Vote:** "Yes" vote amends constitution to prohibit laws that restrict employers' and employees' ability to negotiate for the use of payroll deductions and union security agreements.

### III. RESULT OF "NO" VOTE

ORS 250.035(2)(c) requires that a ballot title contain a "simple and understandable statement," 25 words long, explaining what will happen if voters reject the measure. This means that the statement must explain to voters "the state of affairs" that will exist if the initiative is rejected, i.e., the status quo. It is essential that the "no" vote result statement relate to the subject matter of the proposed measure to avoid misleading petition signers or voters about the effect of their signature or vote. *Nesbitt v. Myers*, 335 Or 219 (2003), (original review) 335 Or 424, 431 (2003) (review of modified ballot title).

The draft "No" statement does not comply with these requirements for the same reason the caption and "Yes" statement are deficient – failure to mention union security agreements. To cure this defect, we suggest the following "No" statement:

**Result of "No" Vote:** "No" vote rejects constitutional amendment; retains existing law; no prohibitions on laws restricting ability to negotiate payroll deductions and union security agreements.

### IV. SUMMARY

ORS 250.035(2)(d) requires that a ballot contain a "concise and impartial statement of not more than 125 words summarizing the measure and its major effects." "[T]he purpose of the summary is to help voters understand what will happen if the measure is approved" and "the breadth of its impact." *Mabon*, 322 Or at 640 (quoting *Fred Meyer, Inc. v. Roberts*, 308 Or 169, 175 (1989)).

The second sentence in the summary - "The constitution does not expressly prohibit laws that restrict those negotiations." - causes the draft summary to not comply with statutory standards. As an initial matter, this sentence is confusing because it uses three negative words: "not," "prohibit," and "restrict." The use of three negative words in close proximity to each other causes voter confusion and should be avoided. *Greene v. Kulongoski*, 322 Or 169, 177, 903 P2d 366 (1995) (the risk of voter confusion by use of three negative terms requires modification of caption); *Mabon v. Keisling*, 317 Or 406, 416, 856 P2d 1023 (1993) (rejecting use of triple negative in summary).

Elections Division  
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The second problem with this sentence is that it inaccurately describes current law. The sentence states, or at the very least implies, that the Oregon Constitution does not prohibit restrictions on employment negotiations regarding payroll deductions. In other words, this sentence implies that the Oregon Constitution allows restrictions on these employment negotiations. This is not the law in Oregon. These types of employment negotiations are already protected by the broad free speech protections contained the Oregon Constitution. In *State v. Ciancanelli*, 339 Or 282, 121 P.3d 613, 629 (2005), the Oregon Supreme Court concluded that "the people who framed and adopted Article I, section 8, as part of the original Oregon Constitution intended to prohibit broadly any laws directed at restraining verbal or nonverbal expression of ideas of any kind." *Id.* Given this sweeping interpretation of Article I, section 8, it is inaccurate to state or imply that the Oregon Constitution allows restrictions regarding payroll deduction negotiations.

To address the problems identified, we suggest the following summary:

**Summary:** Amends constitution. Current law allows employees and employers to negotiate to use payroll deductions for financial contributions. The Oregon Constitution protects those negotiations. Measure amends constitution to specifically prohibit laws that would restrict the categories of employers or employees that may use payroll deductions; the persons or entities to whom those deductions may be directed; purposes for which deducted funds may be used, including charitable, political, or union-related; or the ability to require union-represented employees, including non-union members, to pay for representation services. Measure does not require employers to make payroll deductions available to employees, does not repeal existing laws, and does not affect laws relating to collection of child or spousal support through wage withholding or deductions.

## V. PROCEDURAL CONSTITUTIONAL REQUIREMENTS

IP 36 would amend the Constitution in two ways. First, it would prohibit laws that restrict employment negotiations regarding payroll deductions. Second, it would prohibit laws that restrict employment negotiations regarding union security agreements. Because the measure embraces two subjects, it contains two constitutional amendments and, thus, violates the separate-vote requirement set out in Article XVII, section 1 of the Oregon Constitution. Furthermore, these two changes are not closely related enough to comply with the separate-vote requirement.

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

Very truly yours,

Jill Gibson Odell  
Gibson Law Firm

JGO:cd

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2013 DEC 5 PM 1:36  
KATE BROWN  
SECRETARY OF THE STATE

Bill Sizemore  
810 NW Rimrock Drive  
Redmond, OR 97756  
Email [bills@otu.org](mailto:bills@otu.org)

December 5, 2013

Elections Division  
255 Capitol St. NE  
Suite 501  
Salem, OR 97310

RECEIVED  
2013 DEC 5 PM 2 00  
KATE BROWN  
SECRETARY OF THE STATE

Re: IP-36 procedural compliance comments

To the Secretary of State:

As an active, registered Oregon elector I am writing to offer my comments regarding whether initiative petition #36, which was filed by Art Towers for the 2014 General Election, complies with the procedural constitutional requirements for submission of initiative petitions.

I believe this proposal violates the single amendment rule as set forth Article 17 and interpreted in the *Armatta* decision. (See *Armatta v. Kitzhaber*, 327 Or. 250, 959 P.2d 49 (1998).

1. IP-36 amends Article IV, which sets forth the initiative rights of the people. IP-36 limits the kinds of measures the people may place on the ballot; indeed making entire areas of law off limits to the people.
2. IP-36 limits the language of future measures. Such a restriction constitutes prior restraint of speech, which amends Article I, Section 8.
3. IP-36 amends Article IV Section 17, which authorizes the state legislative assembly have all powers necessary for a legislative body of a state. IP-36 forbids the legislature from adopting legislation affecting all of the areas of law that IP-36 places off limits.
4. By disallowing any restrictions whatsoever regarding payroll deductions, IP-36 amends Article 1, Sections 2 and 3, which guarantee Oregonians freedom of religion and worship. Section 2 (3) and (4) of IP-36 give a majority of employees the right to require their fellow employees to make donations (via payroll deductions) to any church or other charity that a majority of employees supports. This would be an unprecedented and radical change in the rights of Oregonians and would amend citizens' rights of conscience. A minority of employees could be required to support a religious institution to which they were opposed. Currently, an employee so affected could sue to protect his or her rights under Article 1, sections 2 and 3, but if this measure passes, that defense would be nonexistent. A majority of employees in a bargaining unit could force fellow employees to support any cause the majority wished - without restraint.
5. IP-36 amends Article 1, Section 5 by allowing money to be drawn from the public treasury to pay money to a religious institution and to pay the cost of transferring money to religious institutions. If a majority of the employees in a bargaining units vote to have money deducted from employees paychecks and given to a charity that is a church or other religious institution, then under IP-36 money would be transferred directly from the public treasury to the religious institution without ever being given to the employee who earned the money. In this event, even if the money was deemed to be the employee's money and not the government's, the mere cost of transferring the money would be born by the treasury.

Elections Division

Bill Sizemore's procedural requirements comments for 2014 IP-36

Dec. 5, 2013

Page 2

IP-36 amends various parts of the Constitution in ways that are not closely related. It may not be overly lengthy as to its language, but the changes it makes are far reaching. If enacted, it would violate certain fundamental rights of the citizens of this state in ways that are unprecedented.

Finally, because this measure is so sweeping and includes so many major and varied subjects. In fact, a reasonable ballot title caption and reasonably representative yes and no statements cannot be drafted.

While several provisions of this measure relate to payroll deduction and would enact sweeping changes to this area of law, subsection 5 of section 2 introduces an entirely different subject as if designed to be camouflaged within a measure about rights to unfettered payroll deductions. Subsection 5 outlaws "right to work" laws, which have nothing to do with payroll deductions.

If placed before the voters, the measure would serve as a perfect example of "bait and switch" and "log rolling" at its worst. For this reason, IP-36 should be rejected for violation of the single subject rule set forth in Article IV, Section 2(d).

Sincerely,

Bill Sizemore

RECEIVED  
2013 DEC 5 PM 2 00  
KATE BROWN  
SECRETARY OF THE STATE

**Bill Sizemore**  
**810 NW Rimrock Drive**  
**Redmond, OR 97756**  
**Email [bills@otu.org](mailto:bills@otu.org)**

December 5, 2013

Elections Division  
255 Capitol St. NE  
Suite 501  
Salem, OR 97310

Re: IP-36 draft ballot title comments

To the Secretary of State:

RECEIVED  
2013 DEC 5 PM 2 00  
KATE BROWN  
SECRETARY OF THE STATE

As an active, registered Oregon elector I am writing to offer my comments on the draft ballot title for initiative petition #36, which was filed by Art Towers for the 2014 General Election.

I do not believe the draft ballot title for IP-36 complies with the standards set forth in ORS 250.035.

First, the caption of the draft ballot title does not set forth the subject of this proposed measure. As I will discuss further in my separate comments regarding the fact that this proposal is in direct conflict with the Armatta decision, which prohibits constitutional amendments that effect different, unrelated parts of the Constitution, IP-36 is really two separate issues – or two amendments rolled into one. Thus it has a second subject that must be described in the caption and yes and no vote statements.

The first four provisions of Section 2 relate to payroll deductions and restrictions thereon. The fifth provision introduces an entirely separate issue, i.e., the ability of unions to collect “fair share” or payments in lieu of dues from employees who are not members of the union, but the union is required to represent. This provision, which is a sort of “anti right to work” provision is a different subject entirely and as a matter of law must be described in the caption. The draft caption only describes the payroll deduction aspects of the proposal and fully ignores the fair share aspect.

Section 2 purports to describe the kinds of payroll deduction “restrictions” that are being outlawed by Section 1, but in reality provision 5 is not about payroll deductions and has no relation to the first four provisions or subsections. Under this provision, fair share employees could be required to make payments in lieu of dues, whether by payroll deduction or otherwise.

Next, it is very difficult to understand the effect Section 3 of IP-36 has on the rest of the measure. Section 3 says that the measure does not require any employer to make payroll deductions available to employees. This is more than a little confusing. The first section says laws cannot be enacted to place restrictions on payroll deductions and the third section says the measure does not require that payroll deductions be made available at all. So, if a ballot measure was placed on the ballot to prohibit all payroll deductions, it would seem to comply with Section 3 expressly and yet would possibly violate Section 1, because it would limit the ability of employees to negotiate the terms of payroll deductions by not allowing them at all. The caption and yes and no vote statements should convey this oddity and state that the affect of the measure or at least parts of it are unclear.

Next, the measure allows employers to not provide payroll deductions at all, but if they do allow them, no restrictions whatsoever may be placed upon whom will receive the deducted money or what they may do with it. The actual language of the proposal is quite sweeping, and because the measure is a proposed constitutional amendment, it would supersede any statute or ordinance that conflicts with it. This is a major shift from current policy. For example, in a small company where the number of employees might be very small, employees could demand that money be deducted from their paychecks to be paid to a cult or say to the Ku Klux Klan or some militia group. As extreme as this may sound, it does fall within the language of this proposed ballot measure. Because the measure uses the words

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Bill Sizemore's ballot title comments for 2014 IP-36  
Dec. 5, 2013  
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"such as" and then lists three very general potential recipient of payroll deductions, it leaves the door open to almost any kind of entity.

It appears that the kinds of payroll deductions that employees can demand cannot be restricted in any way, even to charitable, political, and union related deductions. The words "such as," indicate that the deductions that are allowed go further than just the ones listed. Therefore, the deductions listed should not be stated in the ballot title because they are simply the kind voters might find palatable. In reality, the measure prohibits all restrictions on the purposes for which money may be deducted from an employee's paycheck and the summary should state that fact rather than list the purposes offered merely as examples in the measure. This is a serious issue and has constitutional implications because it opens the door to trampling on the rights of employees who might be in a minority regarding a certain matter or issue.

It is one thing for an employee to direct his or her own funds to some cause or purpose that might make a sailor blush, but it is quite another to require an employer, including a public employer using public resources, to transfer funds to the coffers of the Ku Klux Klan or to a particular religious sect.

Let's say for example that the majority of employees in a bargaining unit, whether public or private sector, decided they wanted to support Oregon Right to Life or the Mormon or Catholic Church or Basic Rights Oregon, etc. That majority could require every employee in that bargaining unit to join in doing so. Because IP-36 is a proposed constitutional amendment, it supersedes every protection afforded citizens elsewhere in state law and in the Oregon Constitution. This is not far-fetched. Oregon Right to Life and Basic Rights Oregon are political entities, so payroll deductions to their benefit may not be restricted under the terms of IP-36. The Mormon and Catholic Churches are 501 (c)(3) charities. If a majority of employees in a bargaining unit (and/or a zealous employer) were say Catholics or Mormons, members could vote to require every employee to support their church and they could do this constitutionally and democratically under the terms of IP-36.

Such a far reaching and radical result should be described at least in the summary and the yes vote statement lest voters enact this proposal into law and not realize what they are doing. The summary should state that the measure overrides other constitutional protections and allows money to be transferred using public resources for the benefit of religious institutions and political entities or for any other reason whatsoever, if a majority of the employees negotiate such an end.

In conclusion, the obvious though unstated intent of this proposal is at least two fold: (a) to preempt laws that would prohibit the use of payroll deductions for politics, something the chief petitioner and other labor union leaders have opposed at great expense in the past; and (b) to outlaw "right to work" laws, which is an issue unrelated to (a). The caption, the yes vote statement, and the summary should all include a description of subsection 5 of Section 2, i.e., that the measure guarantees unions the right to require nonunion employees to pay for union representation they do not want. That provision is fifty percent of the affect of this proposal and must be described.

The summary should not list examples of payroll deductions because the list is not exhaustive and suggests that payroll deduction could not be used for unsavory or illegitimate uses, which this measure clearly allows and does so on a constitutional level.

Thanks in advance for considering my comments.

Bill Sizemore

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December 5, 2013

Via Fax: (503)373-7414

The Honorable Kate Brown  
Secretary of State  
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255 Capital Street NE, Suite 501  
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2013 DEC 5 PM 3 49  
KATE BROWN  
SECRETARY OF THE STATE

Re. Initiative Petition 36 (2014) - Draft Ballot Title Comments  
Our File No. 4815-1163

Dear Secretary Brown:

This office represents Joseph Baessler and BethAnne Darby, Oregon electors and interested parties in Initiative Petition 36 (2014). Joseph Baessler is the Political Director for AFSCME Council 75 and BethAnne Darby is the Associate Executive Director of Government Relations for the Oregon Education Association. We write to comment on the draft ballot title for IP 36.

## 1. INTRODUCTION

Initiative petition 36 (2014) is a constitutional amendment to protect the ability of Oregon employees and their employers to agree on terms governing the use of payroll deductions. Section 1 prohibits the enactment of laws restricting that right. Section 2 then provides additional examples of the types of laws that are prohibited. Notably, Section 2 does not purport to give an *exclusive* list of prohibited laws. Rather, it is an *inclusive* list of examples. ("The type of laws prohibited by Section 1 *include* \*\*\*").

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Section 3 clarifies that the measure does not *require* any employer to make payroll deductions available to its employees. Finally, Sections 4 and 5 make clear that the initiative is not intended to roll back or alter current law, or laws relating to payment of debts through wage withholding or payroll deductions.

In order to craft an accurate ballot title, it is important to understand the backdrop of current law, as well as attacks on public employee ability to use payroll deductions.

First, current law recognizes the right of both public and private employees to agree on terms relating to payroll, either individually or through their collective bargaining representative. *See* ORS 652.610(3) (any deduction must be authorized by employee); *SEIU Local 503 v. Oregon Administrative Services Dep't.*, 20 PECBNR 144 (2002) (a proposal for direct deposit was a mandatory subject of bargaining); *Wy-East Ed. Ass'n. v. Oregon Trail School District*, 22 PECBR 108 (2007) (the timing of pay was a mandatory subject of bargaining). In addition, current law expressly guarantees public employees the ability to authorize payments to their union through voluntary payroll deductions. *See e.g.* ORS 292.955 (authorizing payroll deductions to labor organizations for state employees; ORS 652.610 (recognizing that request for payroll deduction can be individual or pursuant to a collective bargaining agreement) and ORS 243.776 (giving all public employees – including state and local public employees – the right to use payroll deductions to make union payments). Finally, many large employers – both private and public – allow employees to make contributions to charities and nonprofits, such as the United Way, through payroll deductions. They also allow employees to conduct financial transactions, such as paying a car loan, through payroll deductions. *See e.g.* <http://www.portlandonline.com/auditor/index.cfm?c=28786>; and [http://www.portlandonline.com/auditor/index.cfm?c=28784#cid\\_379500](http://www.portlandonline.com/auditor/index.cfm?c=28784#cid_379500). *See also*, <http://www.unitedway-pdx.org/workplace-giving/index.php>. These policies may be collectively bargained, or simply policies adopted by the employer.

Unfortunately, the availability of payroll deduction to employees has been under attack through a variety of initiatives. Voters have rejected proposed restrictions four times in the last 15 years: Measure 58 (1998); Measures 92 and 98 (2000); and Measure 64 (2008). And there have been many more initiatives filed that did not qualify for the ballot: IP 3 and 23 (2012); IPs 34 and 38 (2010); IPs 6, 7, and 12 (2008); IPs 15, 17, 20, 44-48 (2006); IPs 22 and 23 (2004); IPs 18-19, and 33 (2002); and IPs 12 (1998). This



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cycle, three initiatives have been filed seeking to limit the availability of payroll deductions to employees, IPs 1, 2 and 9.

The constitutionality of any measure that restricts payroll deductions based on viewpoint – i.e., who receives the money or how it is spent – is likely unconstitutional. See *Vannatta v. Oregon Government Ethics Com'n*, 347 Or 449, 222 P3d 1077 (2009). Nevertheless, Chief Petitioner has filed IP 36 to unambiguously protect the ability of employees and their employers to agree to make payroll deduction available to their employees. Unfortunately, the draft ballot title does not accurately describe this subject in terms that will be easily understood by voters. It must be revised.

## 2. CAPTION

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

The draft caption is inaccurate and fails to capture the true subject of the measure. It reads:

**Amends Constitution: Prohibits laws that restrict  
negotiations between employers and employees for the  
use of payroll deductions**

There are two main problems. First, the caption must plainly describe the activity which cannot be restricted. This is best done by first describing that activity in the affirmative, and then stating that the proposal prohibits restrictions on that activity. Stated differently, the subject of the measure is the *protection* of the ability of employers

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and employees to negotiate agreements governing payroll deductions and the caption should lead with that concept. That must be the focus of the caption.

Second, the reference to "negotiations" by itself is inaccurate and confusing. The proposal is not intended to protect the act of negotiation itself, but rather, *agreements* that result from those negotiations. That should be the focus of caption. Using the term "agreements" is also more inclusive. While some individuals can certainly "negotiate" terms governing their employment, we most often associate "negotiations" with collective bargaining. But the reach of the proposal is broader to include the right of individuals to authorize payroll deductions. See ORS 652.610(3). Therefore, the ballot title should avoid using the word "negotiate" unless it modifies "agreement."

To address these concerns, we propose the following<sup>1</sup>:

**Amends Constitution: Authorizes employers and their  
employees to agree on terms governing payroll deductions;  
prohibits restrictions**

### 3. RESULT OF "YES" VOTE

ORS 250.035(2)(b) requires that a ballot title contain a "simple and understandable statement of not more than 25 words that describes the result if the state measure is approved." The purpose of this section of the ballot title is to "notify petition signers and voters of the result or results of enactment that would have the greatest importance to the people of Oregon." *Novick v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). Typically, the "yes" vote result statement builds on the caption.

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

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<sup>1</sup> In the alternative, the caption could simply track the operative language set out in Section 1:

**Amends Constitution: Prohibits laws restricting ability of employers  
and employees to agree on terms governing payroll deductions**

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**RESULT OF "YES" VOTE: "Yes" vote amends constitution to prohibit laws that restrict employers' and employees' ability to negotiate for the use of payroll deductions for any purpose.**

Like the caption, this statement impermissibly focuses on the act of negotiating, as opposed to agreements resulting from those negotiations. It also unnecessarily states that the proposal is a constitutional amendment, when that is clear from the caption. Rather, the word space should be used to more fully describe what payroll deductions are used for, so that voters understand the practical issues at stake. Finally, it is inaccurate to say that the law prohibits restrictions "for any purpose." In fact, the initiative explicitly does not repeal or affect laws relating to payment of child or spousal support or the payments of debts.

We propose the following, which tracks our proposed caption<sup>2</sup>:

**RESULT OF "YES" VOTE: "Yes" vote authorizes employers and their employees to negotiate and agree upon terms governing payroll deductions for financial transactions, contributions; prohibits laws restricting payroll deduction.**

#### 4. RESULT OF "NO" VOTE:

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

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<sup>2</sup> Another alternative that tracks the operative language and caption set out in footnote 1 would be:

**RESULT OF "YES" VOTE: "Yes" vote prohibits laws restricting ability of employers and their employees to agree on terms governing the availability of payroll deduction for financial transactions, contributions.**

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

**RESULT OF "NO" VOTE:** "No" vote rejects constitutional amendment; retains existing law; no prohibitions on laws restricting ability to negotiate for the use of payroll deduction.

There are two main problems. First, the independent phrase "rejects constitutional amendment" is impermissibly biased since it focuses exclusively on the form of the proposal (a constitutional amendment) and not the content. Second, the clause "no prohibitions on laws restricting \* \* \*" does not grammatically flow and contains a double negative: "No" vote \* \* \* no prohibitions \* \* \*." We propose the following:

**RESULT OF "NO" VOTE:** "No" vote allows laws that restrict the ability of employers and their employees to agree on terms governing the availability of payroll deductions.

## 5. SUMMARY

ORS 250.035(2)(d) requires that the ballot title contain a summary which accurately summarizes the measure and its major effects in a concise and impartial manner. The goal is to provide voters with enough information to understand what will happen if the measure is approved and the "breadth of its impact." *Fred Meyer, Inc. v. Roberts*, 308 Or 169, 175, 777 P2d 406 (1989).

The draft summary reads:

**Summary:** Amends constitution. Current law allows employees and employers to negotiate to use payroll deductions for financial contributions. The constitution does not expressly prohibit laws that restrict those negotiations. Measure amends constitution to prohibit laws that would restrict the categories of employers or employees that may use payroll deductions; the persons or entities to whom those deductions may be directed; purposes for which deducted funds may be used, including charitable, political, or union-related; or the ability to require union-represented

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Baessler/Darby IP 36 (2014) DBT Comments  
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employees, including non-union members, to pay for representation services. Measure does not require employers to make payroll deductions available to employees, does not repeal existing laws, and does not affect laws relating to collection of child or spousal support through wage withholding or deductions.

The draft summary does a better job of describing the measure and its major effects, but still must be revised in order to meet statutory standards. First, the description of current law should refer to "agreement" instead of "negotiation" for the reasons stated above. Second, the summary incorrectly suggests that IP 35 only prohibits specified restrictions. This is wrong. The list set forth in Section 2 is not an exclusive list of prohibited laws, but rather examples of laws that would violate Section 1. Third, it is unnecessary and misleading to discuss current constitutional protections of payroll deductions. As discussed above, commenters believe that many of the restrictions proposed by earlier initiatives would be found unconstitutional under both the Oregon and U.S. Constitution. While the draft uses the word "express" – arguably making the sentence accurate – voters will undoubtedly come away with the belief that such restrictions are currently constitutional, when that is not necessarily the case.

Third, the description of Section 2(5) is inaccurate and unclear because it does not completely describe the permissible union security agreements and their purpose. See *Towers v. Rosenblum*, 354 Or 125, 129-130 (2013) (ballot title must explain to voters that fair share payments are for union representation services the employee receives and the union is required to provide). To correct these problems, we propose the following alternative:

**SUMMARY:** Amends constitution. Current law allows employers and their employees to agree on terms governing the availability of payroll deduction to employees for contributions, financial transactions. Measure amends constitution to prohibit restrictions on payroll deductions, including restrictions based on type of employer or employee, the persons or entities to whom those deductions may be directed; the purposes for which deducted funds may be used, including charitable, political, or union-related;

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or the ability to negotiate agreements requiring union-represented employees, including non-union members, to pay for representation services they receive and union is required to provide. Measure does not: require employers to make payroll deductions available to employees; repeal existing laws; or affect laws relating to collection of child or spousal support through wage withholding or deductions.

## 6. CONCLUSION

Thank you for your careful consideration of these comments. We look forward to receiving the certified ballot title and explanatory letter when it is prepared.

Sincerely,

Bennett, Hartman, Morris & Kaplan, LLP

Margaret S. Olney  
Of Counsel

MSO:kaj

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# STOLL BERNE

STOLL STOLL BERNE LOKYNG &amp; SHLACHTER P.C. LAWYERS

Steven C. Berman  
sberman@stollberne.com

December 5, 2013

**VIA FACSIMILE**Kate Brown  
Secretary of State  
Elections Division  
255 Capital Street NE, Suite 501  
Salem, OR 97310RECEIVED  
2013 DEC 5 PM 4 21  
KATE BROWN  
SECRETARY OF THE STATERe: Draft Ballot Title for Initiative Petition No. 36 for the General Election of  
November 4, 2014

Dear Secretary Brown:

I represent Arthur Towers regarding the ballot title for Initiative Petition No. 36 for the general election of November 4, 2014 ("the Initiative"). Mr. Towers 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 November 20, 2013, which invites comments on the draft ballot title for the Initiative.

**I. An Overview of Initiative Petition 36**

The Initiative amends the Oregon constitution to protect employer and employee rights to use payroll deductions. It contains four sections. The first section prohibits laws that restrict the ability of employers and employees to negotiate and agree upon terms governing payroll deductions. Section 2 identifies the types of laws prohibited by the Initiative. Sections 3 through 5 limit the scope of the Initiative. Section 3 provides that the Initiative does not require an employer to make payroll deductions. Section 4 provides that nothing in the Initiative repeals or affects any laws in effect as of January 1, 2014. Section 5 provides that the Initiative does not affect any laws relating to payment or collection of support payments.

**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

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Kate Brown  
December 5, 2013  
Page 2

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(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.” *Green*, 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).

The caption in the draft ballot title provides:

**Amends Constitution: Prohibits laws that restrict negotiations between employers and employees for the use of payroll deductions**

Mr. Towers respectfully submits that the caption misstates the major effect of the Initiative. The major effect is to *protect* the right of employers and employees to negotiate and agree upon using payroll deductions for various purposes, if they so desire. Yet, the caption frames this protection in the negative, using the phrase “prohibits laws that restrict” without informing voters and potential petition signers that the Initiative preserves rights under extant law. That will confuse voters, and not fully inform them of the import of the Initiative. *See, e.g., Greene*, 322 Or at 177 (referring a certified caption for modification because the use of multiple negative terms; “a lawyer may be able to determine the measure’s subject, but we think that a lay reader probably will get lost along the way”).

Because the caption frames the protections provided by the Initiative in the negative, the caption also is underinclusive. The caption must set forth the changes the measure would make in the context of existing law. The major effect of the Initiative is to identify and protect existing legal rights. Sections 1 and 2 set forth the rights protected; section 4 clarifies that the Initiative preserves the law in effect as of January 1, 2014. However, the caption emphasizes (and paraphrases) only Section 1, and disregards the other sections of the Initiative. “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’s selective emphasis on the provisions of section 1 render the caption underinclusive.

The caption is underinclusive for a second reason. The initiative prohibits negotiations *and* agreements. However, the caption mentions only “negotiations.” The caption selectively highlights “negotiations” without mentioning “agreements.”



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December 5, 2013  
Page 3

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## 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:

**Result of "Yes" Vote:** "Yes" vote amends the constitution to prohibit laws that restrict employers' and employees' ability to negotiate for the use of payroll deductions for any purpose.

**Result of "No" Vote:** "No" vote rejects constitutional amendment; retains existing law; no prohibitions on laws restricting ability to negotiate for the use of payroll deductions.

The results statements should be revised for the reasons set forth above.

The yes statement also should be revised for the additional reason that the phrase "for any purpose" is overbroad and inaccurate. *See, e.g., Caruthers v. Myers*, 344 Or 596, 604 (2008) (ballot title failed to "communicate the measure's more limited effect"). The Initiative identifies five categories of laws that are prohibited. Initiative, § 2. However, the Initiative does not bar laws restricting payroll deductions for all purposes. The Initiative explicitly excludes laws relating to child or spousal support. Initiative, § 5. Moreover, the Initiative would not allow payroll deductions for illegal activity, such as for the purchase of illicit drugs or other criminal acts.

The result of no statement also should be revised, because the description of current law – "no prohibitions on laws restricting ability to negotiate for the use of payroll deductions" – is inaccurate. Employees have free speech rights under the Oregon and federal constitutions to engage in "negotiations" regarding the use of payroll deductions. The no statement misstates current law.

## 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." The summary should be revised for the reasons set forth above. The summary also should be revised for two additional reasons. First, the phrase "[t]he constitution does not expressly prohibit laws that restrict those negotiations" is misleading. The free speech protections in the Oregon and federal constitutions protect free speech in myriad circumstances, including the workplace. The language in the summary could lead voters to conclude that constitutional free speech protections recognized for employees are somehow exceptional or extraordinary, as opposed to falling well within the broader realm of freedom of speech. Second, the phrase "or the ability to require union-represented employees, including non-union members, to pay for representation costs" is

Kate Brown  
December 5, 2013  
Page 4

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excessive, unnecessary and inaccurate. As the Supreme Court recently reaffirmed in *Towers v. Rosenblum*, 354 Or 125, 129-130 (2013) a ballot title addressing "fair share" payments *must* inform voters that represented employees who do not join the union *receive the benefits* of the representation. The description of fair share payments in the draft summary does not meet that requirement.

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

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SECRETARY OF THE STATE



DEPARTMENT OF JUSTICE  
APPELLATE DIVISION

December 20, 2013

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

RECEIVED  
2013 DEC 20 PM 3:28  
KATE BROWN  
SECRETARY OF THE STATE

Re: Proposed Initiative Petition — Amends Constitution: Prohibits Laws That Would Restrict Negotiations and Agreements Between Employers and Employees for Payroll Deductions  
DOJ File #BT-36-13; Elections Division #36

Dear Mr. Williams:

We have received the comments submitted in response to the draft ballot title for Initiative Petition 36 (2014). Steven C. Berman, on behalf of Arthur Towers; Margaret Olney, on behalf of Joseph Baessler and BethAnne Darby; Jill Gibson Odell, on behalf of Dan Harmon; and Bill Sizemore, on his own behalf, submitted comments. 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).

**A. The Draft Caption**

The draft caption provides:

**Amends Constitution: Prohibits laws that restrict negotiations between employers and employees for the use of payroll deductions**

Currently, the Oregon constitution does not expressly prohibit laws that would restrict the ability of employers and employees to negotiate for and agree to payroll deductions. The subject matter of the initiative—its major effect—is to expressly prohibit such laws. Payroll deduction agreements that the amendment would protect include those for charitable or political purposes, as well as those for payroll deductions under “fair share” union security agreements that require non-union employees to pay for union representation services that they receive.

### **Commenters Baessler and Darby**

Commenters Baessler and Darby identify two potential problems with the caption. First, they suggest that the caption should be stated in the affirmative because the subject matter of the measure is the protection of the ability of employers and employees to agree to payroll deductions. Second, they argue that the use of “negotiations” in the caption without “agreements” is inaccurate and confusing because IP 36 protects both negotiations and agreements.

We agree with the commenters’ second suggestion. Arguably at least, using only “negotiations” in the caption is accurate because, ideally, agreements follow negotiations. That is their purpose. But because Section 1 of IP 36 references both negotiations and agreements, the caption should as well, and we have changed it to reflect that. We disagree, however, with commenters’ first suggestion. IP 36’s prohibition is stated in the negative: “No law shall restrict the ability . . .” Given that, it would be misleading to state, as the commenters suggest, that the measure “[a]uthorizes employers and their employees to agree on terms . . .” Employers and employees may already do so; no authorization is required. IP 36 is a forward-looking prophylactic, not a grant of rights.

### **Commenter Harmon**

Commenter Harmon objects to the caption because it does not refer to union security agreements, rendering the caption under-inclusive and therefore inaccurate. We agree that IP 36 would prohibit laws that restrict agreements for payroll deductions under union security agreements, but because those are only one type of agreement that the measure protects and because those agreements are referenced in the summary, it is not necessary to reference them in the caption. The major effect of IP 36 is to prohibit restrictions on payroll deduction agreements for a wide variety of purposes. To emphasize one of those purposes—union security agreements—and omit others, such as charitable purposes, would mislead voters.

### **Commenter Towers**

Commenter Towers states that the caption is under inclusive for two reasons: caption mentions negotiations but not agreements, and it states the measure’s effect in the negative even though it protects existing rights.

We agree with the commenter’s first contention and disagree with his second for the reasons stated in response to commenters Baessler and Darby’s comments above.

### **Commenter Sizemore**

Commenter Sizemore objects to the draft ballot title’s caption because it does not mention that Section 2 of the initiative would restrict laws that limit union security agreements. Commenter Sizemore says that this portion of Section 2 is “not about payroll deductions.” The

commenter also says that the caption should explain a purported contradiction in Section 3 of the initiative.

We agree that one aspect of Section 2 does relate to the ability of unions to collect payments from non-union employees; however, we disagree that it does not pertain to payroll deductions. Section 1 clearly prohibits one broad category of laws: those that restrict the ability of employers and employees to negotiate for and agree to payroll deduction terms. Section 2 is a non-exclusive list of the types of laws that Section 1 prohibits, all of which must necessarily relate to payroll deductions. Payroll deductions under union security agreements are just one example of payroll deductions that laws may not restrict under the measure, though an important one. But those payroll deductions under so-called "fair-share" agreements are not distinct from the other kinds of payroll deductions protected under the proposed measure, and the caption, which refers to laws governing "the use of payroll deductions," is broad enough to encompass the payroll deductions under union security agreements. For that reason, and for the reasons stated in response to commenter Harmon's comments, the caption should not be changed to reference union security agreements.

We disagree that Section 3 is an "oddity," as the commenter suggests. It is not a contradiction to, on one hand, restrict laws that *prohibit* payroll deductions and, on the other hand, to not *require* payroll deductions. Section 1 accomplishes the former, and Section 3 says the latter.

For those reasons, we certify the following ballot title caption:

**Amends Constitution: Prohibits laws that would restrict negotiations and agreements between employers and employees for payroll deductions**

## **B. The Result Statements**

The draft "yes" result statement provides:

**Result of "Yes" Vote:** "Yes" vote amends the constitution to prohibit laws that restrict employers' and employees' ability to negotiate for the use of payroll deductions for any purpose.

The draft "no" result statement provides:

**Result of "No" Vote:** "No" vote rejects constitutional amendment; retains existing law; no prohibitions on laws restricting ability to negotiate for the use of payroll deductions.

## **Commenters Baessler and Darby**

Commenters Baessler and Darby identify three potential problems with the "yes" statement. First, they suggest that the statement, like the caption, impermissibly focuses on

negotiations while failing to mention agreements. Second, they argue it is unnecessary to restate that the measure would amend the constitution. Third, the commenters contend that the statement is inaccurate when it says that payroll deductions may be used for “any purpose” when Section 5 of IP 36 expressly states that the measure would not impact laws relating to child support, spousal support, or other payroll garnishments or deductions.

We agree with the commenters’ first suggestion for the reasons stated concerning the caption above. We agree with the commenters’ second suggestion, and we have omitted reference to amending the constitution in the certified statement. Finally, we also agree with the commenters’ third suggestion. For that reason, we have omitted “any purpose” from the certified “yes” result statement.

Commenters Baessler and Darby also suggest that the “no” result statement is inadequate because the phrase “rejects constitutional amendment” is “impermissibly biased” and because the statement includes a double negative. We disagree that the phrase is biased; it is an unvarnished statement of fact. We agree, however, that the statement could be better stated and have revised it accordingly.

#### **Commenter Harmon**

Commenter Harmon states that the draft “yes” result statement is deficient for the same reason as the caption: “[I]t does not notify voters that the measure would protect negotiations regarding union security agreements.” We disagree with the commenter for the reasons discussed above.

Commenter Harmon objects to the “no” result statement for the same reason, and we disagree for the same reasons.

#### **Commenter Towers**

Commenter Towers objects to the “yes” result statement for a similar reason as commenters Baessler and Darby: the use of “any purpose” is overbroad and inaccurate. We agree for the reasons discussed above, and we have omitted that phrase from the certified “yes” result statement.

Commenter Towers suggests that the “no” vote is inaccurate because it fails to explain that the Oregon and federal constitutions impliedly protect the ability of employers and employees to negotiate for and agree to payroll deductions. We agree, at least in part, and for that reason we have added the word “express” to the “no” result statement.

#### **Commenter Sizemore**

Commenter Sizemore suggests that the “yes” result statement should describe some of the possible results of enacting this proposal into law, such as requiring employees to support through payroll deductions causes that they disagree with or are opposed to for moral or religious

reasons. We disagree. The certified “yes” statement below tells voters that employers and employees may use these deductions for a variety of purposes. That is sufficiently broad to cover all the kinds of payroll deductions mentioned in the measure, and we reject the commenter’s suggestion to describe the speculative “far reaching and radical results.”

Commenter Sizemore makes the same comment concerning Section 3 for the result statements as he does for the caption above. We disagree for the same reasons explained above.

We certify the following results statements:

**Result of “Yes” Vote:** “Yes” vote prohibits laws that restrict the ability of employers and employees to negotiate for and agree to use of payroll deductions for several purposes.

**Result of “No” vote:** “No” vote retains existing law, which does not expressly prohibit laws restricting employers’/employees’ ability to negotiate for and agree to use of payroll deductions.

#### **C. The Summary**

The draft summary provides:

**Summary:** Amends constitution. Current law allows employees and employers to negotiate to use payroll deductions for financial contributions. The constitution does not expressly prohibit laws that restrict those negotiations. Measure amends constitution to prohibit laws that would restrict the categories of employers or employees that may use payroll deductions; the persons or entities to whom those deductions may be directed; purposes for which deducted funds may be used, including charitable, political, or union-related; or the ability to require union-represented employees, including non-union members, to pay for representation services. Measure does not require employers to make payroll deductions available to employees, does not repeal existing laws, and does not affect laws relating to collection of child or spousal support through wage withholding or deductions.

#### **Commenters Baessler and Darby**

Commenters Baessler and Darby object to the summary on four grounds.

First, the commenters renew their suggestion that the summary should say “agreements” as well as “negotiations.” We agree for the reasons discussed above.

Second, the commenters fault the summary because it suggests that IP 36 only prohibits specific categories of laws. We agree that voters could conclude that the list in the summary is exclusive, which would be incorrect because Section 2 uses the word “include.” For that reason, we have added “for example” to the summary.

Third, commenters Baessler and Darby also fault the summary because “voters will undoubtedly come away with the belief that such restrictions are currently constitutional.” We disagree. The draft summary uses the word “expressly” and accurately states the law. Nonetheless, to avoid potential confusion, we have revised the summary to make clear that this measure would expressly prohibit such restrictions.

Finally, commenters Baessler and Darby consider the summary “inaccurate and unclear because it does not completely describe the permissible union security agreements and their purpose.” Although we believe it unnecessary, at best, to “completely” describe union security agreements and their purpose in the ballot title, we have added the words “they receive” to address the commenters’ concerns.

### **Commenter Harmon**

Commenter Harmon objects to the use of three negative words in the second sentence of the summary due to its potential to confuse voters. We agree and have amended the summary in accordance below.

Commenter Harmon also objects to the summary’s characterization of current law because it “states, or at the very least implies, that the Oregon constitution does not prohibit restrictions on employment negotiations regarding payroll deductions.” We agree that the summary implies that the constitution does not currently prohibit restrictions on payroll deduction negotiations or agreements, but we disagree with the commenter’s proposed changes. While the commenter is correct that the Supreme Court’s broad view of free speech rights under Article 1, section 8, arguably prohibits the same sort of laws that IP 36 would prohibit, it remains true that the constitution contains no express prohibition. Nor has the Supreme Court announced that it contains an implicit prohibition. Nonetheless, as discussed above in response to commenters Baessler and Darby’s comments, we have revised the summary in response to the commenters’ concerns.

### **Commenter Towers**

Commenter Towers objects to the summary on two grounds. First, the commenter objects to the use of the word “express” for similar reasons as commenter Harmon and commenters Baessler and Darby. We disagree for the reasons discussed above. Second, commenter Towers states that “the phrase ‘or the ability to require union-represented employees, including non-union members, to pay for representation costs’ is excessive, unnecessary and inaccurate.”<sup>1</sup> We do not agree..

### **Commenter Sizemore**

For the summary, commenter Sizemore renews his suggestion that the statement should describe some of the possible results of enacting this proposal into law, such as requiring

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<sup>1</sup> The commenter misquotes the draft summary, which says “services,” not “costs.”



employers to support through payroll deductions causes that they disagree with or are opposed to for moral or religious reasons. The commenter also renews his suggestion that the ballot title should more fully describe the impact of subsection 5 of Section 2; *i.e.*, payroll deductions under union security agreements.

We disagree that the summary must include descriptions the hypothetical possibilities that the commenter suggests. The summary states that payroll deductions may be used for charitable, political, or union-related purposes pursuant to a negotiated agreement. That sufficiently describes the broad range of entities that could receive payroll deduction funds under the protected employee-employer negotiated agreements. We also disagree with the commenter's suggestion that the summary does not adequately address union security agreements. Both the draft summary and the certified summary below adequately state that the measure would prohibit laws that restrict, among other payroll deductions, those made pursuant to "the ability to require union-represented employees, including non-union members, to pay for representation services." The addition of "union" and "that they receive" in response to commenter Towers suggestions provides additional explanation.

We certify the following summary:

**Summary:** Amends constitution. Current law allows employees and employers to negotiate for and agree to payroll deductions for a variety of purposes, including charitable, political, and union-related. Measure changes current law by expressly prohibiting laws restricting, for example: the categories of employers or employees that may use payroll deductions; the persons or entities to whom those deductions may be directed; the purposes for which deducted funds may be used; or deductions under "fair share" agreements (requiring union-represented employees, including non-union members, to pay for union representation services they receive). Measure does not require employers to make payroll deductions available to employees, does not repeal existing laws, and does not affect laws relating to collection of child or spousal support through wage withholding or deductions.

As modified, we certify the ballot title.

Sincerely,

Matthew J Preusch  
Honors Attorney  
Matthew.J.Preusch@doj.state.or.us

MJP:chc/4861244

Enclosure...

December 20, 2013

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**BALLOT TITLE**

**Amends Constitution: Prohibits laws that would restrict negotiations and agreements between employers and employees for payroll deductions**

**Result of "Yes" Vote:** "Yes" vote prohibits laws that restrict the ability of employers and employees to negotiate for and agree to use of payroll deductions for several purposes.

**Result of "No" Vote:** "No" vote retains existing law, which does not expressly prohibit laws restricting employers'/employees' ability to negotiate for and agree to use of payroll deductions.

**Summary:** Amends constitution. Current law allows employees and employers to negotiate for and agree to payroll deductions for variety of purposes, including charitable, political, and union-related. Measure changes current law by expressly prohibiting laws restricting, for example: the categories of employers or employees that may use payroll deductions; the persons or entities to whom those deductions may be directed; the purposes for which deducted funds may be used; or deductions under "fair share" agreements (requiring union-represented employees, including non-union members, to pay for union representation services they receive). Measure does not require employers to make payroll deductions available to employees, does not repeal existing laws, and does not affect laws relating to collection of child or spousal support through wage withholding or deductions.

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DEC 20 PM 3 22  
KATE BROWN  
SECRETARY OF THE STATE

## **NOTICE OF FILING AND PROOF OF SERVICE**

I certify that on January 21, 2014, I directed the original Respondent's Answering Memorandum to Petition to Review Ballot Title Re: Initiative Petition No. 36 (Supreme Court) to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and served upon Jill Gibson Odell, attorney for petitioner, by using the court's electronic filing system.

I further certify that on January 21, 2014, I directed the Respondent's Answering Memorandum to Petition to Review Ballot Title Re: Initiative Petition No. 36 (Supreme Court) to be served upon Arthur Towers, chief petitioner, by mailing a copy, with postage prepaid, in an envelope addressed to:

Arthur Towers  
813 SW Alder St. Suite 800A  
Portland, OR 97205

/s/ Matthew J Preusch

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