IN THE SUPREME COURT OF THE STATE OF OREGON

JILL GIBSON, Petitioner, v. **ELLEN F. ROSENBLUM,** Attorney General, State of Oregon Respondent.	Case No. PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL Initiative Petition 35 (2016) 63356

BALLOT TITLE CERTIFIED
June 17, 2015
Initiative Petition 35
Chief Petitioner: Jill Gibson

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I. PETITION TO REVIEW BALLOT TITLE

Petitioner Jill Gibson is the author of IP 35, its chief petitioner, an elector of this State, a person dissatisfied with the ballot title for IP 35, and is adversely affected by Respondent's actions. Because Petitioner timely submitted written comments concerning the draft ballot title, she has standing to seek review pursuant to ORS 250.085(2).[1]

II. ARGUMENTS AND AUTHORITIES

A. Introduction

IP 35 would amend the Oregon Public Employee Collective Bargaining Act (PECBA), ORS 243.650–243.782, which allows public employees ("employees") to be represented by public employee unions ("unions"). PECBA does not require union membership, but it allows public employers ("employers") and unions to enter into agreements that require payments-in-lieu-of-dues from union nonmembers. ORS 243.650(18). Thus, nonmembers can be required to make payments, commonly referred to as "fair share dues," to a union against their will as a condition of employment. *See* ORS 243.650(10) (defining "fair share agreement").

As recognized by this Court and the United States Supreme Court, these required dues impinge upon employees' freedom of speech and freedom of association. *Elvin* v. *Oregon Public Employees Union,* 313 Or. 165, 168, 832 P3d 36 (1992) ("forcing a person - even a member of a collective bargaining unit - to be affiliated with and, to some extent, to thereby further the social and political views of a union has an impact on the person's right of free speech and association"); *Knox v. SEIU*, 567 U.S. ___, ___ (slip op at 14) (2012) ("the compulsory fees constitute a form of compelled speech and association that imposes a significant impingement on

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[1] A copy of IP 35 is attached as Exhibit 1; the draft ballot title is attached as Exhibit 2; Petitioner's comments are attached as Exhibit 3; Respondent's explanatory letter is attached as Exhibit 4; and the certified ballot title is attached as Exhibit 5.

First Amendment rights") (internal quotes omitted); *Davenport* v. *Washington Ed Assn.,* 551 U.S. 177, 181 (2007) ("agency shop arrangements in the public sector raise First Amendment concerns because they force individuals to contribute money to unions as a condition of government employment").

The U.S. Supreme Court has tolerated compulsory dues in order to promote "labor peace" and discourage "free riders." *Abood* v. *Detroit Bd. of Ed.* 431 U. S. 209, 224 (1977). However, the Court has recently criticized *Abood* as an "anomaly" and stated that "free-rider arguments . . . are generally insufficient to overcome First Amendment objections." *Harris v. Quinn* ___ U.S. ___ (2014) (slip op at 12). In *Harris* the Court signaled its willingness to overturn *Abood* and declare compulsory union dues unconstitutional. *Id.* (slip op at 21). ("The *Abood* Court seriously erred in treating [prior cases] as having all but decided the constitutionality of compulsory payments to a public-sector union."). On June 29, 2015, the U.S. Supreme Court granted certiorari of *Friedrichs v. California Teachers Association*, No 14-915, which provides the Court an opportunity to make such a ruling.

Until such ruling is made, and in the event it is not, IP 35 seeks to protect employees' First Amendment rights by prohibiting compulsory payments to unions. The actual major effect of IP 35 is that nonmembers will no longer be required to make payments to unions. *See* Section 2 ("Compulsory payments to labor organizations by public employees who choose to not join a labor organization shall be prohibited."). IP 35 would also continue to protect the collective bargaining rights of employees who want to form, join, and be represented by a union. IP 35 is similar to IP 9 (2014) except for one very significant difference: it eliminates the "free rider" effect. Unlike IP 35, IP 9 did not exclude nonmembers from collective bargaining units and did not relieve unions of their obligation to represent nonmembers. Under IP 9 nonmembers would

have continued to be represented by unions yet not have to pay for such representation, resulting in so called "free riders." *Towers v. Rosenblum*, 354 Or 125, 310 P3d 136 (2013). In response to the unions' criticism of IP 9 and because the purpose of the initiative was not to create an unfair situation for unions and their members, Petitioner redrafted the initiative so that nonmembers would be excluded from collective bargaining and unions would not be required to represent nonmembers.

B. Certified Ballot Title

In spite of this fundamental change, Respondent has concluded that IP 35 would allow "free riders." This conclusion is contrary to controlling case law and the plain language of the measure. The ballot title closely tracks IP 9's ballot title; however, IP 35 and IP 9 are fundamentally different. Instead, Respondent should have certified a ballot title that omits any reference to "free riding," such as the one certified for IP 27 (2010), which like IP 35 also stated that unions would not be required to represent nonmembers. Based upon Respondent's explanatory letter, it is not clear that her office sufficiently read IP 35 or Petitioner's comments. Respondent states that Petitioner objected to all parts of the draft ballot title; however, Petitioner only objected to the draft summary. Now, because of changes to the draft ballot title, Petitioner objects to all portions of the certified ballot title because they no longer comply with ORS 250.035(2)(a)-(d).

C. Respondent's Conclusion that IP 35 Allows "Free Riders" is Incorrect

1. Respondent disregards controlling case law. This Court has already reviewed an initiative that explicitly relieved unions of their duty to represent nonmembers and a "free rider" effect was not included in the ballot title. In *Caruthers v. Myers*, 344 Or 596, 189 P3d 1 (2008), the initiative (IP 27) provided, "No employee shall be required to pay dues or other monies to a

union and no union shall be required to represent or bargain for an employee who chooses not to be a member of the union," and the caption was ultimately modified to state, "Prohibits requiring employees to share union representation costs; changes public employee union obligations to nonmembers." Like IP 35, the *Caruthers* initiative did not allow "free riders" and such effect was not identified in the ballot title.

However, unlike IP 35, in *Caruthers* the union's representation obligation was unclear because the initiative did not exclude nonmembers from bargaining units and the initiative did not expressly amend existing law. *See Id.* at 602 ("The interpretative issue posed by the proposed measure is the extent to which the proposed measure, if adopted, would alter existing state law governing the relations between public sector unions and the workers they represent."). This ambiguity is not present in the instant case because IP 35 is seven pages long, expressly amends PECBA (showing deletions and insertions to ORS 243.650 - 243.672), and expressly amends the definition of collective bargaining to exclude nonmembers. Respondent has ignored Section 3(4) of IP 35 in determining that nonmembers would be "free riders" and that it is "unclear" that unions would be relieved from the duty to represent nonmembers.

2. Respondent has inappropriately interpreted the legal effect of IP 35. Respondent's conclusion that IP 35 allows "free riders" is unsupported by any case law or statutes on point. Rather this is the *argument* of opponents to IP 35 and Respondent has adopted their argument. These opponents repeatedly compare IP 35 to IP 9; however, IP 9 was fundamentally different because it did not exclude nonmembers from collective bargaining and did not relieve unions of their duty to represent nonmembers. Petitioner vehemently disputes the argument that IP 35 would allow "free riders" and it is well settled that Respondent may not adopt a disputed interpretation of a measure. *See, e.g., Crumpton v. Kulongoski*, 321 Or 269, 276, 896 P2d 577

("This court has avoided taking sides in [] controversies over interpretation of a measure's ambiguous words by requiring use of the words of the measure, or a close paraphrase of those words, in the ballot title.). When there are two or more plausible interpretations of a proposed initiative, this Court declines to choose, or permit the Attorney General to choose, one of those interpretations for purposes of the ballot title. *Id.*; *see also Kouns v. Paulus*, 296 Or 826, 828, 680 P2d 385 (1984) (it is not the Attorney General's function to interpret a proposed measure in preparing a ballot title). Respondent's interpretation of IP 35 clearly is beyond the scope of this ballot title process.

3. Respondent's legal interpretation of IP 35 is flawed and unsupported. Even if Respondent were allowed to choose between competing interpretations of an initiative, the interpretation she chose is unsupported. She reaches this conclusion because she believes "If a public employer were to refuse to allow that non-union public employee terms at least as favorable as the union-bargained terms, the 'natural and probable effect' of that refusal is that the public employer would violate ORS 243.672(l)(a) by interfering with or coercing that employee with respect to the protected decision whether to join a union." Exhibit 4 at p. 4. A deconstruction of this argument reveals its fallacy, as set forth below.

a) Respondent has incorrectly determined that nonmembers would be in a collective bargaining unit. IP 35 takes nonmembers out of the collective bargaining process by amending "collective bargaining" to exclude nonmembers. Section 3(4) (Collective bargaining "means the performance of the mutual obligation of a pubic employer and the representatives of its employee **who have chosen to join a labor organization**. . . .") (emphasis included in original). An "appropriate bargaining unit" means a unit designated for "collective bargaining," which, again, pursuant to IP 35, only includes "employees who have chosen to join a labor

organization." Section 3(1) and (4). Because the term "collective bargaining" is a definitional component of the term "appropriate bargaining unit," changing the definition of "collective bargaining" also changes the definition of "appropriate bargaining unit." Moreover, pursuant to IP 35, "exclusive representatives" only have the right to be the "*collective bargaining* agent of all employees who have chosen to join a labor organization." Section 3(8)(emphasis added); *see also* Section 6(1). Finally, Section 8 expressly states that unions are "not required to *collectively bargain* for or provide representation services to public employees who choose to not join a labor organization and who do not pay for such services." *Id.* (emphasis added). Because the initiative amends the definition of "collective bargaining" to exclude nonmembers, the initiative provision that protects collective bargaining activities (ORS 243.672(1)(a)) would not apply to nonmembers. Moreover, a union has no duty of fair representation with regard to a person who is not part of a bargaining unit. *Reidy v. OPEU,* 10 PECBR 180, 182 (1987).

b) Respondent has incorrectly determined that employers who offer different employment terms to nonmembers would violate ORS 243.672(1)(a). Even if nonmembers were included in the definition of "collective bargaining," employers would not be "coercing" nonmembers by offering them different employment terms. ORS 243.672(1)(a) provides it is an unfair labor practice to "interfere with, restrain, or coerce employees in or because of the exercise of rights guarantees in ORS 243.662."[2] If IP 35 passed, Respondent assumes that employers would establish arbitrary terms of employment; however, employers would be legally required to set employment terms in a nondiscriminatory manner. In addition to general laws that protect employees from discrimination, state employees who are not part of collective bargaining are specifically protected by the State Personnel Relations Law ("SPRL"), ORS Chapter 240.

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[2] ORS 243.662 gives employees the right to participate in collective bargaining.

SPRS establishes protections and rights, including a merit pay system that takes individual performance into consideration, for all classified employees. ORS 240.235. To incent good performance, the merit pay system allows employers to provide monetary awards to employees for meritorious service and contribution to the mission of the employing agency. *Id.* Given the fairness and rewards provided by SPRS, many employees may prefer to have their salary set according to their own high performance and unique skills rather than receive the standard salary required by a CBA, especially since those employees would not have to forfeit their rights to freedom of speech and association. In sum, under IP 35, nonmembers would continue to be protected from workplace discrimination and arbitrary employer actions.[3]

Employment terms based on performance, knowledge, and experience would not be coercive or discriminatory under ORS 243.671(1)(a) or (c) because the terms would be based on legitimate, nondiscriminatory reasons, and not based upon protected collective bargaining activities. *See Portland Ass'n Teachers v. Multnomah Sch. Dist. No. 1,* 171 Or App 616, 623, 16 P3d 1189 (2000) (complainant must show that the employer was motivated to act based on the employee's union activity); *Norris v. Oregon State Police Dep't,* 3 PECBR 1994, 2002 (1978) (there is no violation as long as the employer shows that its actions are unconnected to union activity). Nonmembers would not be participating in union activity; therefore, it could not be a basis for the employment terms.

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[3] SPRS also provides that selecting and promoting employees shall be based on their ability, knowledge, experience, and skills, without regard to race, color, religion, sex, sexual orientation, disability, or political affiliation. ORS 240.306(1). The Employment Relations Board reviews personnel actions affecting employees not in a collective bargaining unit that are alleged to be arbitrary, contrary to law, or taken for political reasons. ORS 240.086(1). SRPS does not cover employees in a collective bargaining unit. ORS 240.321(2).

Respondent also incorrectly applied the "natural and probable effect" test for finding a violation because she used a subjective test. *See* Exhibit 4 at p. 4. However, the subjective impressions of employees are not controlling and determinations are based on an objective standard and the totality of the circumstances. *AFSCME Local 88 v. Multnomah County,* 18 PECBR 430, 437 (2000). Moreover, even if Respondent used the correct standard, no violation could be found because individual employee complaints that do not involve participation in union activities are not covered by ORS 243.672(1)(a). *See, e.g., Eugene Charter School Professionals, AFT, AFL-CIO v. Ridgeline Montessori Public Charter School,* ERB Case No. UP-34-08, at 13, 23 PECBR 316, 328 (Sept 15, 2009) ("Protected activity does not include strictly individual complaints about working conditions . . . that are unrelated to the activities of a labor organization."); *Lane County Public Works Ass'n v. Lane County,* 13 PECBR 187, 200 (1991), *aff'd,* 118 Or App 46 (1993) (pursuing a personal interest, such as a promotion or pay increase, outside the context of bargaining is not protected). In the "free rider" hypothetical Respondent lays out, a nonmember would have to claim that if he or she did not receive the same employment terms as members, then the nonmember would be coerced to join the union in order to get the same employment terms. These hypothetical complaints necessarily would be individually pursued and the nonmember would not have been participating in protected collective bargaining activity. Respondent cites to *Oregon Nurses Association v. Oregon Health & Science University*, 19 PECBRA 590 (2002), which is irrelevant because that case involved paying different wages to employees in a bargaining unit. *See Id.* at 603 ("OHSU unlawfully interfered with and coerced bargaining unit members."). Under IP 35, nonmembers would not be bargaining unit members.

Finally, assuming *arguendo* that the above elements of a violation could exist, the final element of a causal connection could not be established between protected union activity and employer action. The Employment Relations Board will not find a violation if an employer proves that its action was taken for good cause and for legitimate, nondiscriminatory reasons. *Oregon Ass'n of Justice Attorneys v. Dep't of Justice,* 17 PECBR 102, 135 (1997); *Teamsters, Local 670 v. Rural Road Assessment Dist. #3,* 8 PECBR 6580, 6584 (1984). As supported by considerable case law, an employer who bases nonmember employment terms upon objective criteria such as performance, skills, and experience will not be coercing nonmembers in violation of ORS 243.672(1)(a).[4] As a result, under IP 35 employers will not be required to give nonmembers the same employment terms as members and there is no "free rider" effect.

III. CONCLUSION

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

DATED this 30th day of June, 2015.

Respectfully submitted,

/s/ Jill Gibson

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Of Attorneys for Petitioner

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[4] Concerning, ORS 243.672(1)(c), a violation will be found "only if the employer acted with a discriminatory motive, intending to undermine employees' exercise of [rights protected by the Public Employee Collective Bargaining Act]." *ATU, Division 757 v. Tri-Met,* ERB Case No. UP-62-05, at 34, 22 PECBR 911, 944 (Jan 16, 2009) (citing *Teamsters Local 670 v. City of Vale,* 20 PECBR 337, 352, *order on recons.,* 20 PECBR 388 (2003)).

Be It Enacted by the people of the state of Oregon:

SECTION 1. 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 be a member of a labor organization as a condition of public employment.
(3) A person shall not be required to make compulsory payments to a labor organization as a condition of public employment.
(4) A labor organization shall not be required to collectively bargain for or provide representation services to public employees who choose to not join a labor organization.

SECTION 2. Compulsory payments to labor organizations by public employees who choose to not join a labor organization shall be prohibited.

SECTION 3. ORS 243.650 is amended to read:
ORS 243.650. As used in ORS 243.650 to 243.782, unless the context requires otherwise:

(1) "Appropriate bargaining unit" means the unit designated by the Employment Relations Board or voluntarily recognized by the public employer to be appropriate for collective bargaining. However, an appropriate bargaining unit may not include both academically licensed and unlicensed or nonacademically licensed school employees. Academically licensed units may include but are not limited to teachers, nurses, counselors, therapists, psychologists, child development specialists and similar positions. This limitation does not apply to any bargaining unit certified or recognized prior to June 6, 1995, or to any school district with fewer than 50 employees.

(2) "Board" means the Employment Relations Board.

(3) "Certification" means official recognition by the board that a labor organization is the exclusive representative for all of the employees **who have chosen to join a labor organization** in the appropriate bargaining unit.

(4) "Collective bargaining" means the performance of the mutual obligation of a public employer and the representative of its employees **who have chosen to join a labor organization** to meet at reasonable times and confer in good faith with respect to employment relations for the purpose of negotiations concerning mandatory subjects of bargaining, to meet and confer in good faith in accordance with law with respect to any dispute concerning the interpretation or application of a collective bargaining agreement, and to execute written contracts incorporating agreements that have been reached on behalf of the public employer and the employees in the bargaining unit covered by such negotiations. The obligation to meet and negotiate does not compel either party to agree to a proposal or require the making of a concession. This subsection may not be construed to prohibit a public employer and a certified or recognized representative of its employees **who have chosen to join a labor organization** from discussing or executing written agreements regarding matters other than mandatory subjects of bargaining that are not

prohibited by law as long as there is mutual agreement of the parties to discuss these matters, which are permissive subjects of bargaining.

(5) "Compulsory arbitration" means the procedure whereby parties involved in a labor dispute are required by law to submit their differences to a third party for a final and binding decision.

(6) "Confidential employee" means one who assists and acts in a confidential capacity to a person who formulates, determines and effectuates management policies in the area of collective bargaining.

(7)(a) "Employment relations" includes, but is not limited to, matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment.

(b) "Employment relations" does not include subjects determined to be permissive, nonmandatory subjects of bargaining by the Employment Relations Board prior to June 6, 1995.

(c) After June 6, 1995, "employment relations" does not include subjects that the Employment Relations Board determines to have a greater impact on management's prerogative than on employee wages, hours, or other terms and conditions of employment.

(d) "Employment relations" does not include subjects that have an insubstantial or de minimis effect on public employee wages, hours, and other terms and conditions of employment.

(e) For school district bargaining, "employment relations" excludes class size, the school or educational calendar, standards of performance or criteria for evaluation of teachers, the school curriculum, reasonable dress, grooming and at-work personal conduct requirements respecting smoking, gum chewing and similar matters of personal conduct, the standards and procedures for student discipline, the time between student classes, the selection, agendas and decisions of 21st Century Schools Councils established under ORS 329.704, requirements for expressing milk under ORS 653.077, and any other subject proposed that is permissive under paragraphs (b), (c) and (d) of this subsection.

(f) For employee bargaining involving employees covered by ORS 243.736, "employment relations" includes safety issues that have an impact on the on-the-job safety of the employees or staffing levels that have a significant impact on the on-the-job safety of the employees.

(g) For all other employee bargaining except school district bargaining and except as provided in paragraph (f) of this subsection, "employment relations" excludes staffing levels and safety issues (except those staffing levels and safety issues that have a direct and substantial effect on the on-the-job safety of public employees), scheduling of services provided to the public, determination of the minimum qualifications necessary for any position, criteria for evaluation or performance appraisal, assignment of duties, workload when the effect on duties is insubstantial, reasonable dress, grooming, and at-work personal conduct requirements respecting smoking, gum chewing, and similar matters of personal conduct at work, and any other subject proposed that is permissive under paragraphs (b), (c) and (d) of this subsection.

(8) "Exclusive representative" means the labor organization that, as a result of certification by the board or recognition by the employer, has the right to be the collective bargaining agent of all employees **who have chosen to join a labor organization** in an appropriate bargaining unit.

(9) "Fact-finding" means identification of the major issues in a particular labor dispute by one or more impartial individuals who review the positions of the parties, resolve factual differences and make recommendations for settlement of the dispute.

[*(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. Upon the filing with the board of a petition by 30 percent or more of the employees in an appropriate bargaining unit covered by such union security agreement declaring they desire that the agreement be rescinded, the board shall take a secret ballot of the employees in the unit and certify the results thereof to the recognized or certified bargaining representative and to the public employer. Unless a majority of the votes cast in an election favor the union security agreement, the board shall certify deauthorization of the agreement. A petition for deauthorization of a union security agreement must be filed not more than 90 calendar days after the collective bargaining agreement is executed. Only one such election may be conducted in any appropriate bargaining unit during the term of a collective bargaining agreement between a public employer and the recognized or certified bargaining representative.]

(10) [*(11)*] "Final offer" means the proposed contract language and cost summary submitted to the mediator within seven days of the declaration of impasse.

(11) [*(12)*] "Labor dispute" means any controversy concerning employment relations or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment relations, regardless of whether the disputants stand in the proximate relation of employer and employee.

(12) [*(13)*] "Labor organization" means any organization that has as one of its purposes representing employees in their employment relations with public employers.

(13) [*(14)*] "Last best offer package" means the offer exchanged by parties not less than 14 days prior to the date scheduled for an interest arbitration hearing.

(14) [*(15)*] "Legislative body" means the Legislative Assembly, the city council, the county commission and any other board or commission empowered to levy taxes.

(15) [*(16)*] "Managerial employee" means an employee of the State of Oregon or the Oregon University System who possesses authority to formulate and carry out management decisions or who represents management's interest by taking or effectively recommending discretionary actions that control or implement employer policy, and who has discretion in the performance of these management responsibilities beyond the routine discharge of duties. A "managerial employee" need not act in a supervisory capacity in relation to other employees. Notwithstanding this subsection, "managerial employee" does not include faculty members at a community college, college or university.

(16) [*(17)*] "Mediation" means assistance by an impartial third party in reconciling a labor dispute between the public employer and the exclusive representative regarding employment relations.

[*(18) "Payment-in-lieu-of-dues" means an assessment to defray the cost for services by the exclusive representative in negotiations and contract administration of all persons in an appropriate bargaining unit who are not members of the organization serving as exclusive representative of the employees. The payment must be equivalent to regular union dues and assessments, if any, or must be an amount agreed upon by the public employer and the exclusive representative of the employees.*]

(17) [*(19)*] "Public employee" means an employee of a public employer but does not include elected officials, persons appointed to serve on boards or commissions, incarcerated persons working under section 41, Article I of the Oregon Constitution, or persons who are confidential employees, supervisory employees or managerial employees.

(18) [*(20)*] "Public employer" means the State of Oregon, and the following political

subdivisions: Cities, counties, community colleges, school districts, special districts, mass transit districts, metropolitan service districts, public service corporations or municipal corporations and public and quasi-public corporations.

(19) [*(21)*] "Public employer representative" includes any individual or individuals specifically designated by the public employer to act in its interests in all matters dealing with employee representation, collective bargaining and related issues.

(20) [*(22)*] "Strike" means a public employee's refusal in concerted action with others to report for duty, or his or her willful absence from his or her position, or his or her stoppage of work, or his or her absence in whole or in part from the full, faithful or proper performance of his or her duties of employment, for the purpose of inducing, influencing or coercing a change in the conditions, compensation, rights, privileges or obligations of public employment; however, nothing shall limit or impair the right of any public employee to lawfully express or communicate a complaint or opinion on any matter related to the conditions of employment.

(21) [*(23)*] "Supervisory employee" means any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection therewith, the exercise of the authority is not of a merely routine or clerical nature but requires the use of independent judgment. Failure to assert supervisory status in any Employment Relations Board proceeding or in negotiations for any collective bargaining agreement does not thereafter prevent assertion of supervisory status in any subsequent board proceeding or contract negotiation. Notwithstanding the provisions of this subsection, a nurse, charge nurse or similar nursing position may not be deemed to be supervisory unless that position has traditionally been classified as supervisory.

(22) [*(24)*] "Unfair labor practice" means the commission of an act designated an unfair labor practice in ORS 243.672.

(23) [*(25)*] "Voluntary arbitration" means the procedure whereby parties involved in a labor dispute mutually agree to submit their differences to a third party for a final and binding decision.

SECTION 4. ORS 243.656 is amended to read:

243.656 Policy statement. The Legislative Assembly finds and declares that:

(1) The people of this state have a fundamental interest in the development of harmonious and cooperative relationships between government and its employees;

(2) Recognition by public employers of the right of public employees to organize and full acceptance of the principle and procedure of collective negotiation between public employers and public employee organizations can alleviate various forms of strife and unrest. Experience in the private and public sectors of our economy has proved that unresolved disputes in the public service are injurious to the public, the governmental agencies, and public employees;

(3) Experience in private and public employment has also proved that protection by law of the right of employees to organize and negotiate collectively safeguards employees and the public from injury, impairment and interruptions of necessary services, and removes certain recognized sources of strife and unrest, by encouraging practices fundamental to the peaceful adjustment of disputes arising out of differences as to wages, hours, terms and other working conditions, and by establishing greater equality of bargaining power between public employers and public employees;

(4) The state has a basic obligation to protect the public by attempting to assure the orderly and uninterrupted operations and functions of government; and

(5) It is the purpose of ORS 243.650 to 243.782 to **protect the right and freedom of public employees to choose whether or not to join a labor organization. It is also the purpose of ORS 243.650 to 243.782 to prohibit compulsory payments to labor organizations by public employees who choose to not join a labor organization. It is also the purpose of ORS 243.650 to 243.782 to** obligate public employers, public employees **who choose to join a labor organization,** and their representatives to enter into collective negotiations with willingness to resolve grievances and disputes relating to employment relations and to enter into written and signed contracts evidencing agreements resulting from such negotiations. It is also the purpose of ORS 243.650 to 243.782 to promote the improvement of employer-employee relations within the various public employers by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice, and to be represented by such organizations in their employment relations with public employers.

SECTION 5. 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) Public employees who choose to not join a labor organization or to not annually renew membership in such an organization shall not be required to pay dues or payments-in-lieu-of-dues to a labor organization, another organization, or third party as a condition of employment.

SECTION 6. 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 **who annually indicate in writing that they choose to join and be represented by a labor organization** 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 **who is represented by a labor organization** or group of **such** 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 7. ORS 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) Violate ORS 243.670(2).

(j) Enter into a contract that requires public employees who choose to not join a labor organization to make compulsory payments to a labor organization.

(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 a contract which requires public employees who choose to not join a labor organization to make compulsory payments to a labor organization.

(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 8.

(1) A labor organization is not required to collectively bargain for or provide representation services to public employees who choose to not join a labor organization and who do not pay for such services.

(2) As used in this section, "representation services" means representation regarding employment relations.

SECTION 9. 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, extension, or modification of any kind of a contract or agreement or to a new contract or agreement entered into after the effective date the Act.

DRAFT BALLOT TITLE

Public employee unions not required to represent non-members; may not assess non-members for representation costs

Result of "Yes" Vote: "Yes" vote authorizes public employee unions to decline representing non-members. Non-members cannot be required to pay representation costs. Union membership requires annual renewal.

Result of "No" Vote: "No" vote retains authority for bargaining agreements requiring non-member public employees to share in costs of representation union must provide non-members. Membership renewals not required.

Summary: Current law allows public employees to bargain collectively through a labor organization/union of their choosing as their exclusive representative; prohibits requiring union membership as a condition of public employment; requires union to fairly represent both members and non-members in bargaining unit; allows collective bargaining agreements requiring public employees who choose not to join union to share the costs of the legally required union representation. Measure removes requirement that public employee unions represent non-members; prohibits requiring non-members to contribute to costs of representation; union members must renew membership annually. Measure applies to new, renewed, or extended contracts entered into after the effective date of the measure. Other provisions.

GIBSON
LAW FIRM

June 2, 2015

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

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

Re: Public Comment on Initiative Petition 35 (2016)

Dear Secretary Atkins,

I am the Chief Petitioner of IP 35 and an elector in the State of Oregon. This letter provides my comment on the draft ballot title for IP 35 (2016). Thank you in advance for considering my comments.

The Attorney General has proposed the following ballot title for IP 35:

Public employee unions not required to represent non-members; may not assess non-members for representation costs

Result of "Yes" Vote: "Yes" vote authorizes public employee unions to decline representing non-members. Non-members cannot be required to pay representation costs. Union membership requires annual renewal.

Result of "No" Vote: "No" vote retains authority for bargaining agreements requiring non-member public employees to share in costs of representation union must provide non-members. Membership renewals not required.

Summary: Current law allows public employees to bargain collectively through a labor organization/union of their choosing as their exclusive representative; prohibits requiring union membership as a condition of public employment; requires union to fairly represent both members and non-members in bargaining unit; allows collective bargaining agreements requiring public employees who choose not to join union to share the costs of the legally required union representation. Measure removes requirement that public employee unions represent non-members; prohibits requiring non-members to contribute to costs of representation; union members must renew membership annually. Measure applies to new, renewed, or extended contracts entered into after the effective date of the measure. Other provisions.

EXHIBIT 3
PAGE 1 OF 6

I. INTRODUCTION

IP 35, if adopted by voters, would amend the Oregon Public Employee Collective Bargaining Act (PECBA), found at ORS 243.650 *et seq*. Currently, PECBA allows public employers and public employee unions to enter into agreements that require payments-in-lieu-of-dues from employees who choose not to join a union. ORS 243.650 (18). Thus, union nonmembers can be forced to make payments to a union against their will as a condition of employment. This impinges upon public employees' freedom of speech and freedom of association. *See Elvin* v. *Oregon Public Employees Union*, 313 Or. 165, 168 (1992) ("forcing a person - even a member of a collective bargaining unit - to be affiliated with and, to some extent, to thereby further the social and political views of a union has an impact on the person's right of free speech and association"). The United States Supreme Court has also stated that forced fee payments represent an impingement on the First Amendment rights of nonmembers. *See Knox v. SEIU*, ___ U.S. ___, (slip op at 27) (2012) ("by allowing unions to collect any fees from nonmembers . . . our cases have substantially impinged upon the First Amendment right of nonmembers"); *Davenport* v. *Washington Ed Assn.*, 551 U.S. 177, 181 (2007) ("agency shop arrangements in the public sector raise First Amendment concerns because they force individuals to contribute money to unions as a condition of government employment"); *Ellis* v. *Brotherhood of Railway*, 466 U.S. 435, 455 (1984) ("The dissenting employee is forced to support financially an organization with whose principles and demands he may disagree."); *Abood* v. *Detroit Bd. of Education*, 431 U.S. 209, 222 (1977) ("To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests.").

IP 35 seeks to protect public employees' First Amendment rights by prohibiting forced payments to unions. Section 2 of the measure declares that "Compulsory payments to labor organizations by public employees who choose to not join a labor organization shall be prohibited." IP 35, Section 2. IP 35 is similar to IP 9 (2014); however, IP 35 resolves the "free rider" concern expressed by public employee unions in the past by explicitly allowing labor organizations to not bargain on behalf of nonmembers. IP 35, Section 8(1) ("A labor organization is not required to collectively bargain for or provide representation services to public employees who choose to not join a labor organization and who do not pay for such services.").

Although the major focus and effect of IP 35 is to give public employees the choice of whether or not to be a paying member of a union, the draft ballot title does not mention this effect. In fact, the only place the ballot title mentions "choice" is when it describes current law. The right to choose to not be a paying member is a right that public employees do not have under PECBA, and the ballot title must describe this major effect of the measure.

II. BALLOT TITLE SUMMARY

ORS 250.035(2)(d) requires that a ballot title contain a "concise and impartial statement of not more than 125 words summarizing the state measure and its major effects." The purpose

of a ballot title's summary is to give voters enough information to understand what will happen if the initiative is adopted. *See Whitsett v. Kroger*, 348 Or 243, 252, 230 P.3d 545 (2010).

The summary adequately describes several proposed changes of IP 35; however, it does not accurately and fairly describe certain aspects of current law and the measure. For convenience, we have underlined the language we find noncompliant in the Attorney General's draft summary:

Summary: Current law allows public employees to bargain collectively through a labor organization/union of their choosing as their exclusive representative; prohibits requiring union membership as a condition of public employment; requires union to fairly represent both members and non-members in bargaining unit; allows collective bargaining agreements requiring public employees who choose not to join union to share the costs of the legally required union representation. Measure removes requirement that public employee unions represent non-members; prohibits requiring non-members to contribute to costs of representation; union members must renew membership annually. Measure applies to new, renewed, or extended contracts entered into after the effective date of the measure. Other provisions.

The first sentence of the summary is misleading because it incorrectly implies that that public employees may choose to be represented by any union they want; however, public employees may only be represented by the union that has already been certified to be their "exclusive representative." ORS 243.650(8) provides that an "exclusive representative" is "the labor organization that, as a result of certification by the board or recognition by the employer, has the right to be the collective bargaining agent of all employees in an appropriate bargaining unit." After an exclusive representative has been certified to represent a bargaining unit, all public employees in that bargaining unit must be represented by their previously-selected exclusive representative, and they may not choose to be represented by another union.

The phrase "of their own choosing" does appear in ORS 243.662, but that describes the process of initially choosing to form a union. This statute, and the challenged phrase, does not mean that a public employee may choose which union collectively bargains on their behalf. Once an exclusive representative is initially chosen, all public employees in that bargaining group must be represented by the previously-selected union and public employees may not choose to be represented by a different union.

Significantly, the certified summary for IP 9 did not use this misleading phrase. In fact, the first sentence of the summary is verbatim the first sentence of IP 9's summary, except for the challenged phrase. Because the phrase will likely cause potential voters and signers have an incorrect understanding of current law, the sentence should be the same as it appeared in the court-approved ballot title for IP 9: "Current law allows public employees to bargain collectively through a labor organization/union as their exclusive representative;".

The summary is also unfair because it inappropriately emphasizes the "choice" allowed in current law. IP 35 contains the word "choose" or a variation of it fifteen times, yet the draft ballot title does not use this word even once to describe the measure. Current law regarding collective bargaining, contained in PECBA, contains a variation of the word "choose" only *once*, in ORS 243.662, yet the summary uses this word *twice* to describe current law. Current law does not allow public employees the right to choose whether or not to be paying members of a union; IP 35 does. It is unfair and misleading to describe current law as giving employees a "choice" and not describing the measure as such.

Current statutes do not use the words "public employees who choose not to join union" when describing nonmembers[1]; however, the summary takes this phrase from the measure and uses it to describe nonmembers under current law. On the other hand, the summary refers to the same type of employees simply as "non-members" when describing the measure. Again, this inappropriately implies that public employees have more choice under current law then they would under the measure, which is false. The right of public employees to "choose" to be a paying member or not is a major effect of IP 35, and it is inaccurate and underinclusive to not describe this right when summarizing the measure. It is unfair to summarize current law as allowing more choice in comparison to the measure. To correct this insufficiency, the summary should describe "non-members" as "public employees who choose not to join union" on at least one occasion when describing the measure, such as, "Public employees who choose to not join union cannot be required to make payments to unions."[2]

To compound this insufficiency, the draft summary removes a sentence that was included in IP 9's summary to describe an aspect of the measure that continues to exist in IP 35. It is important to include the sentence stating, "Measure affirms public employee's right to join or not join union;" in IP 35's summary because the summary previously states that current law "prohibits requiring union membership as a condition of public employment." Removing the sentence could cause potential signers and voters to mistakenly believe that IP 35 does not affirm the to join or not join a union, especially since the summary does not use the word "choice" or "choose" when summarizing IP 35. The summary only describes current law as giving employees a choice.

The summary's use of the word "fairly" when describing current law is also unfair because it is a value-laden term that will cause potential signers and voters to

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[1] ORS 243.650(10) describes nonmembers as "employees who are not members" and ORS 243.650(18) describes nonmembers as "persons in an appropriate bargaining unit who are not members."

[2] The challenged description also appeared in the certified summary for IP 9; however, the language was not challenged previously.

believe that the Attorney General is describing current law or a union's current representation obligation as fair. Use of an emotionally-charged or biased word renders the ballot title insufficient. *See Sizemore/Terhune* v. *Myers,* 342 Or 578, 589, 157 P3d 188 (2007) (court rejected use of "benefits" to describe union services because voters may interpret that terminology as an argument against the proposed measure); *Cf. Carley* v. *Myers,* 340 Or 222, 233 (2006) (use of the word "reliable" was fair because it was set off in quotation marks to show that proposed amendment used the word, rather than the Attorney General or the court).

The duty of "fair representation" is a term of art - the name of a legal duty - used in the labor relations context; however, use of the word "fair" is highly prejudicial when used in a ballot title. Most voters' primary consideration when determining whether to support or oppose a measure is fairness. Potential signers and voters unfamiliar with this term will likely believe the word "fairly" is used by the Attorney General as a stand-alone adjective to describe current law or unions. Describing current law as "fair," or appearing to describe current law as "fair" should be strictly avoided because the risk of prejudice is so great.

The summary states that current law requires unions to "fairly represent;" but this phrase does not appear in PECBA. For purposes of the ballot title, the summary should only state that unions are required to represent both members and nonmembers, otherwise it appears that the Attorney General is making an evaluation of something she perceives to be "fair." Describing current representation as "fair" also implies that union representation would be unfair if the measure passed.[3] To remedy this insufficiency, we propose deleting the word "fairly."

For your convenience, the below summary shows my suggested deletions and insertions:

Summary: Current law allows public employees to bargain collectively through a labor organization/union ~~of their choosing~~ as their exclusive representative; prohibits requiring union membership as a condition of public employment; requires union to ~~fairly~~ represent both members and non-members in bargaining unit; allows collective bargaining agreements requiring public employees who choose not to join union to share the costs of the legally required union representation. **Measure affirms public employees' right to join or not join union;** measure removes requirement that public employee unions represent **public employees who choose to not join union** ~~non-members~~; prohibits requiring non-members to contribute to costs of representation; union members must renew membership annually. Measure applies to new,

[3] Although the certified ballot title for IP 9 used the phrase "fairly represent," the word "fairly" was not challenged previously, thus the Oregon Supreme Court has not ruled on this issue. The phrase has been used in other ballot titles concerning collective bargaining; however, the word "fairly" has never been challenged. *See e.g. Caruthers v. Myers*, 344 Or 596, 189 P3d (2008).

renewed, or extended contracts entered into after the effective date of the measure. Other provisions.

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

Very truly yours,

Jill Gibson

ELLEN F. ROSENBLUM
Attorney General

FREDERICK M. BOSS
Deputy Attorney General

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

June 17, 2015

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

Re: Proposed Initiative Petition — Non-Union Public Employees May Benefit from Union Bargaining Without Sharing Representation Costs; Modifies Representation Obligations
DOJ File #BT-35-15; Elections Division #2016-035

Dear Mr. Williams:

We received comments on the Attorney General's draft ballot title for Initiative Petition 35 (2016) (IP 35) from chief petitioner Jill Gibson, Eric Winters, Hanna Vaandering and BethAnne Darby (through counsel, Margaret Olney), Heather Conroy (through counsel, Steven Berman), and Richard Schwarz. The commenters object to the parts of the draft ballot title as follows:

Ms. Gibson objects to all parts the draft ballot title;
Mr. Winters objects to the caption, the "yes" vote result statement, and the summary;
Ms. Vaandering and Ms. Darby object to all parts of the ballot title;
Mr. Conroy objects to all parts of the ballot title; and
Mr. Schwarz objects to all parts of the ballot title.

In this letter, we discuss why we made or did not make changes to each part of the ballot title in light of the submitted comments.

A. The caption

The ballot title must include "[a] caption of not more than 15 words that reasonably identifies the subject matter of the state measure." ORS 250.035(2)(a). The "subject matter" is "the 'actual major effect' of a measure or, if the measure has more than one major effect, all such effects (to the limit of the available words)." *Lavey v. Kroger*, 350 Or 559, 563, 258 P3d 1194 (2011). To identify the "actual major effect" of a measure, the Attorney General must consider the "changes that the proposed measure would enact in the context of existing law." *Rasmussen v. Kroger*, 350 Or 281, 285, 253 P3d 1031 (2011). The draft caption provides:

Public employee unions not required to represent non-members; may not assess non-members for representation costs

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We address the comments and objections below.

1. Comments from Ms. Gibson

Ms. Gibson objects that the caption is deficient in one respect. She argues that an "actual major effect" of IP 35 is to provide public employees with the right to choose whether to be a paying member of a union, and that the caption should identify that effect. (Gibson Letter, 2).

2. Comments from Mr. Winters

Mr. Winters objects to the draft caption in one respect: he contends that the phrase "may not assess non-members for representation costs" is misleading. He asserts that the term "representation costs" is potentially misleading because "[n]on-members do not have the authority to personally direct the work of their 'exclusive representative' so the term 'representation' suggests a relationship between the union and non-member that in many cases simply does not exist." (Winters Letter, 1). He suggests that the caption should instead read (with his proposed changes underlined): "Public employee unions not required to represent non-members; unions may not assess non-members for services". (*Id.*).

3. Comments from Ms. Vaandering and Ms. Darby

Ms. Vaandering and Ms. Darby contend that the draft caption is deficient in two material respects. First, Ms. Vaandering and Ms. Darby contend that the draft caption fails to identify a "free-rider" effect of IP 35. (Olney Letter, 9). They argue that IP 35 would "allow employees choosing not to join the union to receive the benefits of that representation without cost." (*Id.*). They argue that the caption must identify the free-rider effect like other ballot titles concerning similar initiative measures. (*Id.*). They propose that the caption should read: "Allows non-union member public employees to receive union benefits while refusing bargaining costs; modifies representation obligations." (*Id.*); *see Novick/Bosak v. Myers*, 333 Or 18, 26, 36 P3d 464 (2001) (requiring ballot title for IP 39 (2002) to identify free-rider effect); *Sizemore/Terhune v. Myers*, 342 Or 578, 588-89, 157 P3d 188 (2007) (requiring ballot title for IP 48 (2008) to identify free-rider effect); *Towers v. Rosenblum*, 354 Or 125, 131, 310 P3d 136 (2013) (requiring caption for IP 9 (2014) to identify free-rider effect). Second, relying on *Caruthers v. Myers*, 344 Or 596, 602, 189 P3d 1 (2008), Ms. Vaandering and Ms. Darby concede that under IP 35, a union may not have a "duty" to represent non-paying non-union public employees, but argue that the phrase "public employees not required to represent non-members" is "inaccurate and misleading." (Olney Letter, 10). They argue that it is "unclear" whether unions would represent non-union members because unions may not discriminate against non-union public employees (ORS 243.672). They further argue that "non-unit bargaining unit members will still receive union-negotiated wages and benefits, which is a type of representation." (Olney Letter, 10).

4. Comments from Ms. Conroy

Ms. Conroy raises three objections to the draft caption. First, she argues that the caption fails to describe a free-rider effect of IP 35. (Berman Letter, 4). Second, she argues that the phrase "[p]ublic employee unions not required to represent non-members" is inaccurate because "the impact of Section 8 is unclear." (Berman Letter, 4). She suggests that it is unclear because

IP 35 does not affect legal obligations to bargain in a way that does not result in disparate treatment to those who choose to decline union representation (ORS 243.672) even for non-union public employees who decline to pay representation costs. (Berman Letter, 4). Third, she argues that the phrase "[p]ublic employee unions not required to represent non-members" is inaccurate or misleading because: (1) unions and public employers will need to negotiate in a way that does not result in disparate treatment for non-union members; (2) "non-union member public employees will continue to benefit from the collective bargaining agreement a public employee union negotiates for union-member employees in the same bargaining unit"; and (3) a union only has no requirement to bargain for non-members under existing law *unless* the union is the "exclusive representative" of an appropriate bargaining unit (as provided in ORS 243.650(8)). (*Id.* at 4-5).

5. Comments from Mr. Schwarz

Mr. Schwarz argues that the caption is "grossly flawed" because it "states a condition already prohibited under current law" and "mischaracterizes the plain text of IP 35." (Schwarz Letter, 5). However, he does not clearly specify which "conditions" are "already prohibited under current law" or which text is mischaracterized. As we understand his objection, he appears to contend that the caption omits a free-rider effect of IP 35. (*See Id.* at 5, explaining that under IP 35, "[e]mployees exercising the right to join and be represented, regardless of their annual choice, will continue [to] enjoy the terms and conditions of the contract without the obligation to share in the cost of negotiations to secure the agreement").

6. Our response to the comments

After consideration of the comments concerning the draft caption, we agree that the caption should be revised.

With respect to Ms. Gibson's argument that the caption should identify that IP 35 changes law by giving public employees the choice about whether to be a paying member of a union or not, we disagree that that is an "actual major effect" of the measure that should be included in the caption. Under existing law, public employees may choose whether to join or not join a union, and IP 35 does not change that existing right. IP 35 would prohibit requiring employees who make that choice to pay the costs of union representation. But that effect of IP 35 is already explained in the caption (and other parts) of the ballot title.

With respect to Mr. Winter's objection to the use of the term "representation costs," we disagree that the use of that term is misleading. The term "representation costs" provides a sufficient explanation of the types of costs that IP 35 would prohibit unions from requiring non-members to pay. In *Sizemore/Terhune*, the Oregon Supreme Court considered the Attorney General's use of the term "representation costs" in the caption for a similar initiative measure, Initiative Petition 48 (2008) (IP 48). Section 2b of IP 48 (2008) provided that "[n]o person shall be required, as a condition or continuation of employment, to * * * pay any dues, fees, assessments, or other similar charges, however denominated, * * * any amount equivalent to or pro rata portion of dues, fees, assessments, or other charges required of members of a labor organization." IP 48 (2008), § 2. Based on that language, the Attorney General's caption provided: "PROHIBITS NEGOTIATED CONTRACTS REQUIRING: * * * REPRESENTED

NONMEMBERS TO SHARE REPRESENTATION COSTS." On judicial review, the Court agreed that the term "representation costs" appropriately "embraces the various kinds of monetary payments to a labor organization or payments in lieu of dues that the prohibition in section 2b of the proposed measure would affect." *Sizemore/Terhune*, 342 Or at 584. Here, IP 35 would prohibit persons from being "required to make compulsory payments to a labor organization as a condition of public employment." IP 35, § 1(3). Under existing law, the only compulsory payment non-union members pay is the "payment-in-lieu-of-dues" as defined in ORS 243.650(18)—"an assessment to defray the cost for services by the exclusive representative in negotiations and contract administration of all persons in an appropriate bargaining unit who are not member of the organization serving as exclusive representative of the employees" and that "is equivalent to regular union dues and assessments, if any[.]" As the court explained in *Sizemore/Terhune*, the term "representation costs" appropriately embraces the kind of monetary payments IP 35 would prohibit, *i.e.* payments to defray the costs of services for an exclusive representative of "all persons in an appropriate bargaining unit" in negotiations and contract administration. The term "representation costs" is appropriate to include in the caption.

After considering relevant statutes and authorities pertaining to PECBA, we agree with Ms. Vaandering, Ms. Darby, Ms. Conroy, and Mr. Schwarz that IP 35 would create a free-rider effect. The Oregon Supreme Court has repeatedly concluded that such an effect must be included in the caption. *See, e.g.*, *Novick/Bosak*, 333 Or at 26, 36 P3d 464 (2001); *Sizemore/Terhune*, 342 Or at 588-89; *Towers*, 354 Or at 131. Although other existing statutory provisions may contribute to a free-rider effect that would occur if IP 35 were approved by voters, the most immediate cause of that effect is ORS 243.672(1)(a). That statute, not amended by IP 35, provides that "[i]t 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." If IP 35 were approved, ORS 243.672(1)(a) would require a public employer to provide, upon demand by a non-union public employee, employment terms at least as favorable as those offered under the collective bargaining agreement. If a public employer were to refuse to allow that non-union public employee terms at least as favorable as the union-bargained terms, the "natural and probable effect" of that refusal is that the public employer would violate ORS 243.672(1)(a) by interfering with or coercing that employee with respect to the protected decision whether to join a union. *See Oregon Nurses Association v. Oregon Health & Science University*, 19 PECBR 590, 602 (2002) (a public employer violates ORS 243.672(1)(a) when "the natural and probable effect of the employer's action would be to interfere with, restrain, or coerce employees in the exercise of their protected rights"). A public employer's refusal to offer union-bargained terms would leave the non-union public employee to consider two options: (1) accept the public employer's offered employment terms (which are subjectively inferior from the public employee's perspective); or (2) join the union to obtain the union-bargained terms. That is, the "natural and probable effect" of the public employer's refusal would be to pressure the non-union public employees to accept union membership in order to obtain desired union-bargained employer terms. Because PECBA would legally entitle a non-union public employee to obtain at least union-negotiated employment terms, and because IP 35 prohibits a public employer and public employee union from requiring that non-union public employee to share in the union's representation costs, there is a free-rider effect in IP 35.

We also agree with Ms. Vaandering, Ms. Darby, and Ms. Conroy that the phrase "[p]ublic employee unions not required to represent non-members" is inaccurate because a union's representation requirements are uncertain. To some extent, unions will directly or indirectly represent non-members in negotiation and possibly in contract administration matters. We agree that the caption should be revised to reflect that a union's representation obligations will be "modified" by IP 35.

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

Non-union public employees may benefit from union bargaining without sharing representation costs; modifies representation obligations

B. The "yes" vote result statement

We next consider the draft "yes" vote result statement. A ballot title must include "[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is approved." ORS 250.035(2)(b). The "yes" vote result statement should identify "the most significant and immediate" effects of the measure. *Novick/Crew v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). The draft "yes" vote result statement provides:

> **Result of "Yes" Vote:** "Yes" vote authorizes public employee unions to decline representing non-members. Non-members cannot be required to pay representation costs. Union membership requires annual written renewal.

We address the comments and objections below.

1. Comments from Ms. Gibson

Ms. Gibson objects that the "yes" vote result statement is deficient in one respect. She argues that a significant effect of IP 35 is to provide public employees with the right to choose whether to be a paying member of a union, and that the statement should identify that effect. (Gibson Letter, 2).

2. Comments from Mr. Winters

Mr. Winters raises a similar objection to the one he made concerning the caption. He argues that the "yes" vote result statement should replace the term "representation costs" with the phrase "for union services." (Winters Letter, 2).

3. Comments from Ms. Vaandering and Ms. Darby

Ms. Vaandering and Ms. Darby raise three objections to the "yes" vote result statement. First, they object that the phrase "decline representing non-members" is inaccurate and overbroad because "the non-discrimination provisions [of PECBA] that remain mean that non-members will receive representation services – *i.e.*, the benefits of collective bargaining." (Olney Letter, 11-12). Second, they argue that the statement fails to identify the free-rider issue. (*Id.* at 12). Third, they argue that the statement regarding annual membership "is neither

accurate nor necessary." (*Id.*). Instead, they argue that the "yes" vote result statement should identify two changes: (1) that non-union public employees may receive the benefits of bargaining without sharing representation costs; and (2) that union representation duties will change. (*Id.*).

4. Comments from Ms. Conroy

Ms. Conroy argues that the "yes" vote result statement is deficient in several respects. First, she argues that the statement is deficient for the same reasons set forth respecting the caption. (Berman Letter, 5). Second, she argues that the phrase "authorizes public employee unions to decline representing non-members" is misleading because IP 35 does not eliminate the PECBA requirements that public employers and unions negotiate terms that would treat union and non-union members consistently. (*Id.*). Third, she argues that the phrase "union membership requires annual renewal" is inaccurate because: (1) IP 35 "does not say that annual renewal is a condition of union membership for all purposes"; (2) it improperly suggests that public employers may be "compelled" or "required" to join unions; and (3) in *Dale v. Kulongoski*, 321 Or 108, 894 P2d 462 (1995), the Oregon Supreme Court certified a ballot title for an initiative that required annual union membership renewals that did not mention that annual election in the caption or vote result statements. (Berman Letter 6).

5. Comments from Mr. Schwarz

Mr. Schwarz argues that the "yes" vote result statement is deficient because it "seriously misstates that public employee unions can 'decline representing non-members.'" (Schwarz Letter, 6). Schwarz contends that IP 35 provides public employees with a right to annually designate union membership and representation together, and that IP 35 "puts the representation question to the individual public employees, not the union." (*Id.*).

6. Our response to the comments

After consideration of the comments concerning the draft caption, we agree that the "yes" vote result statement should be revised. With respect to Ms. Gibson's argument that the statement should expressly identify that public employees have the right to choose whether to be a paying member of a union, we disagree for the reasons given above. With respect to Mr. Winters's argument that the statement should not use the term "representation costs," we disagree that the use of that term is inaccurate or misleading for the reasons discussed above. With respect to the objection of Ms. Vaandering, Ms. Darby, Ms. Conroy, and Mr. Schwarz that the phrase "prohibits public employee union from representing non-members" is misleading because of the uncertainty about a union's duties to directly or indirectly represent non-member interests, we agree that the phrase should be modified for the reasons discussed above. With respect to Ms. Vaandering's, Ms. Darby's and Ms. Conroy's objection that the statement must be modified to explain the free-rider effect of IP 35, we agree. Lastly, given the need to modify the statement in those respects, we agree that the statement need not identify or explain IP 35's effect on the procedures for joining or renewing membership in a union.

In light of our response above, we modify the "yes" vote result statement to read as follows:

> **Result of "Yes" Vote:** "Yes" vote allows non-union public employees in union-represented bargaining unit to refuse to share in costs of representation union provides; modifies union's representation obligations.

C. The "no" vote result statement

We next consider the draft "no" vote result statement. A ballot title must include "[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is rejected." ORS 250.035(2)(b). The "no" vote result statement "should 'address[] the substance of current law *on the subject matter of the proposed measure*' and 'summarize [ ] the current law accurately.'" *McCann v. Rosenblum*, 354 Or 701, 707, 320 P3d 548 (2014) (quoting *Novick/Crew*, 337 Or at 577) (emphasis added in *Novick/Crew*). The draft "no" vote result statement provides:

> **Result of "No" Vote:** "No" vote retains authority for bargaining agreements requiring non-member public employees to share in costs of representation union must provide non-members. Membership renewals not required.

We address the comments and objections below.

1. Comments from Ms. Gibson

Ms. Gibson objects that the "no" vote result statement is deficient because it, when read with the "yes" vote result statement, fails to identify that a significant effect of IP 35 is to provide public employees with the right to choose whether to be a paying member of a union. (Gibson Letter, 2).

2. Comments from Ms. Vaandering and Ms. Darby

Ms. Vaandering and Ms. Darby contend that the "no" vote result statement is deficient in three respects. First, they contend that the statement fails to identify the threshold requirement that a non-union member must be in a union-represented bargaining unit (*i.e.* an appropriate bargaining unit with an "exclusive representative") in order to be subject to the changes IP 35 would provide. (Olney Letter, 13). Second, they argue that the phrase "representation union must provide non-members" is misleading because a union has an obligation to represent members and non-members. (*Id.*). Third, they argue that the statement "membership renewals not required" is unnecessary, unclear, and "grossly oversimplifies a complicated area of the law. (*Id.*).

3. Comments from Ms. Conroy

Ms. Conroy objects that the "no" vote result statement misstates current law in one respect. She argues that under current law, a non-union public employee may be required to share in the representation costs a union provides for *all bargaining unit members*, and not just

the costs incurred to represent non-members. (Berman Letter, 6). She contends that the Attorney General should instead use the "no" vote result statement ultimately approved for IP 9 (2014), which reads:

> "No" vote retains current law allowing collective bargaining agreements requiring nonmember, union-represented public employees to share in costs of representation union legally must provide.

4. Comments from Mr. Schwarz

Mr. Schwarz objects to the "no" vote result statement in two respects. First, he contends that the statement improperly implies that union membership is a condition of public employee representation. (Schwarz Letter, 6-7). Second, he argues that the statement improperly references membership renewals because membership renewal is not a condition of public employee representation under existing law. (*Id.* at 7).

5. Our response to the comments.

After consideration of the comments concerning the "no" vote result statement, we agree that the statement should be modified. We disagree with Ms. Gibson's argument that the statement should identify that a significant effect of IP 35 is allowing public employees to choose whether to be paying union members. With respect to Ms. Vaandering's and Ms. Darby's argument that the statement should identify that a non-union member must be in a union-represented bargaining to trigger the changes IP 35 provides, we agree. We also agree that the phrase "representation union must provide non-members" should be modified to clarify that a union's representation obligation extends to all members of a bargaining unit. We further agree that the statement need not identify or explain IP 35's effect on the procedures for joining or renewing membership in a union. Lastly, we believe that other modifications to the statement resolve Mr. Schwarz's objection that the statement improperly implies that union membership is necessary for union representation.

In light of our response above, we modify the "no" vote result statement to read as follows:

> **Result of "No" Vote:** "No" vote retains current law allowing collective bargaining agreements requiring non-member, union-represented public employees to share in costs of representation union legally must provide.

D. The summary

We next consider the draft summary. A ballot title must include "[a] concise and impartial statement of not more than 125 words summarizing the state measure and its major effect." ORS 250.035(2)(d). "The purpose of a ballot title's summary is to give voters enough information to understand what will happen if the initiative is adopted." *McCann*, 354 Or at 708. The draft summary provides:

> **Summary:** Current law allows public employees to bargain collectively through a labor organization/union of their choosing as their exclusive

representative; prohibits requiring union membership as a condition of public employment; requires union to fairly represent both members and non-members in bargaining unit; allows collective bargaining agreements requiring public employees who choose not to join union to share the costs of the legally required union representation. Measure removes requirement that public employee unions represent non-members; prohibits requiring non-members to contribute to costs of representation; union members must renew membership annually. Measure applies to new, renewed, or extended contracts entered into after the effective date of the measure. Other provisions.

We address the comments and objections below.

1. Comments from Ms. Gibson

Ms. Gibson objects to the summary in five respects. First, she contends that the phrase "of their choosing" is inaccurate because public employees may only be represented by the union that has been certified to be their "exclusive representative." (Gibson Letter, 3). Second, she argues that the summary is "unfair" because IP 35 uses the word "choose" (or some variant) 15 times when PECBA only uses that term once. (*Id.*). She reasons that the fails to adequately explain that both IP 35 and current law allow public employees to "choose" whether to join or not join a union. (*Id.* at 4). She further argues that the summary should describe "non-members" as "public employees who choose not to join union." (*Id.*). Third, she argues that the summary should include the statement "Measure affirms public employee's right to join or not join union"—to ensure that voters do not mistakenly believe that IP 35 "does not affirm the [choice] to join or not join a union[.]" (*Id.*). Fourth, she contends that use of the term "fairly"—as in "requires union to fairly represent both members and non-members in bargaining unit" is a "value-laden term" that suggests that the Attorney General describes or endorses existing law as being "fair." (*Id.* at 4-5).

2. Comments from Mr. Winters

Mr. Winters objects to the summary in one respect. He contends that the phrase "[c]urrent law allows public employees to bargain collectively through a labor organization/union of their choosing as their exclusive representative" is misleading because current law does not allow *non-member* public employees to choose their exclusive representative. (Winters Letter, 2).

3. Comments from Ms. Vaandering and Ms. Darby

Ms. Vaandering and Ms. Darby object to the summary in four ways. First, they contend that the summary should tell voters that the change in representation obligations is "unclear." (Olney Letter, 14). Second, they argue that the summary describing the elimination of fair share agreements must describe the free-rider issue. (*Id.*). Third, they argue that the phrase "union members must renew membership annually" should read "changes annual membership renewal procedures" to reflect that the effects of IP 35's provisions for annual authorizations are unclear. (*Id.*). Fourth, they suggest that the caption may be improved by alerting voters to the two broad types of representation unions provide (negotiations and contract enforcement) and by changing

the description of the duty of fair representation to explain that that duty applies to all bargaining unit members, regardless of union membership. (*Id.*).

4. Comments from Ms. Conroy

Ms. Conroy objects to the summary in three respects. First, she contends that the summary must describe the free-rider issue. (Berman Letter, 7). Second, she argues that the phrase "[m]easure removes requirements that public employee unions represent non-union members" overstates what IP 35 does because of the uncertain effect the measure would have on a union's representation obligation to non-members. (*Id.*). Third, she contends the phrase "union members must renew membership annually" overstates the effect of IP 35 and that the summary should inform voters that IP 35 "changes" or "modifies" membership renewal requirements. (*Id.*).

5. Comments from Mr. Schwarz

Mr. Schwarz objects that the summary contains all of the flaws he addressed concerning the other parts of the ballot title, and that the summary should be modified to explain that IP 35 gives all public employees, not just union members, "the annual option to designate member *and* representation." (Schwarz Letter, 7).

6. Conclusion

After consideration of the comments concerning the summary, we agree that it should be modified. First, we agree that the phrase "of their choosing" should be removed. Second, we disagree that the number of times the word "choose" is used in the summary causes the summary to be deficient, or that the summary inaccurately describes a public employee's right to choose whether to join a union under IP 35 or under existing law. Third, we disagree that the summary should include the statement "Measure affirms public employee's right to join or not join union" as that principle is readily understandable from the entire content of the summary (in addition to the other parts of the ballot title). Fourth, we agree that the term "fairly," as used in the summary's description of a union's duty of fair representation, should be deleted. Fifth, we agree that the summary should identify that the effects of IP 35's provisions modifying a union's representation obligations and allowing self-representation are unclear. Sixth, we agree that the summary must identify the free-rider effect of IP 35. Seventh, we agree that the summary's description of union membership and renewal procedures should be modified. Eighth, we agree that the caption should be modified to explain that a union's representation obligations include contract negotiations and contract administration/enforcement. Ninth, we disagree that the summary must identify that IP 35 gives public employees an annual option to select union membership and union representation.

In light of our response above, we modify the summary to read as follows:

> **Summary:** Current law allows public employees to bargain collectively through a labor organization/union as their exclusive representative; prohibits requiring union membership as a condition of public employment; requires union to represent (in negotiations and contract enforcement) all public employees in

bargaining unit; allows collective bargaining agreements requiring non-members in bargaining unit to share the costs of the legally required union representation. Measure states that public employee union is not required to represent non-union public employees in bargaining unit (effect is unclear). Measure prohibits requiring non-members to pay union representation costs, including costs of negotiating agreements setting wages/benefits received by non-members; changes membership and renewal procedures. Measure applies to new/renewed/extended contracts entered into after the effective date of the measure. Other provisions.

E. Conclusion

We certify the attached ballot title.

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Enclosure

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Certified by Attorney General on June 17, 2015.

BALLOT TITLE

Non-union public employees may benefit from union bargaining without sharing representation costs; modifies representation obligations

Result of "Yes" Vote: "Yes" vote allows non-union public employees in union-represented bargaining unit to refuse to share in costs of representation union provides; modifies union's representation obligations.

Result of "No" Vote: "No" vote retains current law allowing collective bargaining agreements requiring non-member, union-represented public employees to share in costs of representation union legally must provide.

Summary: Current law allows public employees to bargain collectively through a labor organization/union as their exclusive representative; prohibits requiring union membership as a condition of public employment; requires union to represent (in negotiations and contract enforcement) all public employees in bargaining unit; allows collective bargaining agreements requiring non-members in bargaining unit to share the costs of the legally required union representation. Measure states that public employee union is not required to represent non-union public employees in bargaining unit (effect is unclear). Measure prohibits requiring non-members to pay union representation costs, including costs of negotiating agreements setting wages/benefits received by non-members; changes membership and renewal procedures. Measure applies to new/renewed/extended contracts entered into after the effective date of the measure. Other provisions.

CERTIFICATE OF FILING

I hereby certify that I electronically filed the PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition 35) with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system pursuant to ORAP 16 on June 30, 2015.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition 35) upon the following individuals on June 30, 2015, by delivering a true, full and exact copy thereof via U.S. Mail to:

Matthew J. Lysne, OSB #903285
Senior Assistant Attorney General
Department of Justice
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And upon the following individual via email (irrlistnotifier@sos.state.or.us):

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

DATED this 30th day of June, 2015.

GIBSON LAW FIRM, LLC

/s/ Jill Gibson
Jill Gibson, OSB # 973581
Of Attorneys for Petitioner