ELLEN F. ROSENBLUM
Attorney General

FREDERICK M. BOSS
Deputy Attorney General

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

July 29, 2015

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

Re: *Jill Gibson v. Ellen F. Rosenblum*
SC S063356 (Control); S063362, S063363

Dear Chief Justice Balmer:

Petitioners Jill Gibson, Eric Winters, and Margaret Olney have filed ballot title challenges in the above-referenced matters. Pursuant to ORS 250.067(4), the Secretary of State is required to file with the court the written comments submitted in response to the draft ballot title. Those written comments, under the cover of Elections Division Compliance Specialist Lydia Plukchi's letter, are enclosed for filing with the court. Pursuant to ORAP 11.30(7), we also have enclosed for filing with the court the draft and certified ballot titles, together with their respective cover letters.

Sincerely,

/s/ Matthew J. Lysne

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

MJL:aft/6697072

cc: Jill Gibson
Margaret Olney
Eric Winters

IN THE SUPREME COURT OF THE STATE OF OREGON

JILL GIBSON, Petitioner, v. ELLEN F. ROSENBLUM, Attorney General, State of Oregon, Respondent.	Supreme Court No. S063356 (Control)
HANNA VAANDERING and BETHANNE DARBY, Petitioners, v. ELLEN F. ROSENBLUM, Attorney General, State of Oregon, Respondent.	Supreme Court No. S063362
ERIC WINTERS, Petitioner, v. ELLEN F. ROSENBLUM, Attorney General, State of Oregon, Respondent.	Supreme Court No. S063363 RESPONDENT'S ANSWERING MEMORANDUM TO PETITIONS TO REVIEW BALLOT TITLE RE: INITIATIVE PETITION NO. 35

Pursuant to ORS 250.085, petitioners seek review of the Attorney General's certified ballot title for Initiative Petition 35 (2016) (IP 35). Chief petitioner for IP 35, Jill Gibson, challenges all parts of the ballot title, petitioner Winters challenges the caption, "yes" vote result statement and summary, and petitioners Hanna Vaandering and Bethanne Darby challenge the caption. This court reviews ballot titles for "substantial compliance with the requirements of ORS 250.035." ORS 250.085(5). The Attorney General submits this answering memorandum pursuant to ORAP 11.30(6). As explained below, the

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Attorney General's ballot title for IP 35 substantially complies with ORS 250.035.

A. The Attorney General's caption substantially complies with ORS 250.035(2)(a).

The primary dispute on judicial review concerns the sufficiency of the caption for IP 35. The caption for the ballot title of a state measure must reasonably identify the "subject matter" of the measure and contain no more than 15 words. ORS 250.035(2)(a). The "subject matter" of a ballot title 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).'" *McCann v. Rosenblum*, 354 Or 701, 706, 320 P3d 548 (2014) (quoting *Lavey v. Kroger*, 350 Or 559, 563, 258 P3d 1194 (2011)). The caption for IP 35 reads:

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

Here, the Attorney General identified two "actual major effects" of IP 35: (1) a change in a union's representation obligations during collective bargaining; and (2) the allowance of non-union member public employees to benefit from union bargaining without sharing in the payment of representation costs. As will be explained below, the Attorney General correctly and reasonably identified both of those "actual major effects" of IP 35.

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1. The first actual major effect of IP 35 is a change to a union's representation obligations.

The first actual major effect concerns the alteration of a union's representation obligations during the collective bargaining process. Under existing law, a union acts as the "exclusive representative" for "all employees" in an "appropriate bargaining unit"—a unit that includes union member and non-union member public employees alike. *See* ORS 243.650(8) (defining "exclusive representative" as "the labor organization that * * * has the right to be the collective bargaining agent of *all employees* in an appropriate bargaining unit") (emphasis added); ORS 243.650(1) (defining an "appropriate bargaining unit" as "the unit designated by the Employment Relations Board [ERB] or voluntarily recognized by the public employer to be appropriate for collective bargaining")[1]. IP 35 changes a union's representation obligations, providing that a union would serve as the "exclusive representative" of only the union

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[1] ERB determines an "appropriate bargaining unit" by

> consider[ing] such factors as community of interest (e.g., similarity of duties, skills benefits, interchange or transfer of employees, promotional ladders, common supervisor, etc.), wages, hours and other working conditions of the employees involved, the history of collective bargaining and the desire of the employees.

OAR 115-025-0050(2).

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members of an "appropriate bargaining unit,"[2]—a unit that may include union member public employees as well as non-union member public employees. Thus, IP 35 legally changes or modifies the representation obligations that a union has during the collective bargaining process. That is an "actual major effect" of IP 35 that should be included in the caption.

2. The second actual major effect of IP 35 is allowing non-union member employees to benefit from union bargaining without cost.

The second actual major effect of IP 35 relates to how non-union member public employees may obtain the benefits of union bargaining without sharing in the costs a union incurred in obtaining those benefits, *i.e.* a "free rider" effect. Under existing law, a union may lawfully recoup its representation costs from non-union member employees in an "appropriate bargaining unit" through the imposition of a compelled "payment-in-lieu-of-dues." *See* ORS 243.650(18) (defining "payment-in-lieu-of-dues" as "an assessment to defray the cost for services by the exclusive representative in negotiations and contract

[2] IP 35 appears to allow unions to voluntarily represent the interests of non-union member public employees in bargaining or other matters, provided that they do not compel those employees to pay for representation services. *See* IP 35, § 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"); IP 35, § 2 ("Compulsory payments to labor organizations by public employees who choose to not join a labor organization shall be prohibited").

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administration of all persons in an appropriate bargaining unit who are not members of the organization serving as exclusive representative of the employees"). IP 35 does not change what is an "appropriate bargaining unit" or how ERB designates such a unit, and thus non-union member public employees remain in "appropriate bargaining units." Under IP 35, a union would not be specifically required to represent non-union member public employees, and cannot compel those employees to pay union dues or "payments-in-lieu-of-dues." IP 35, § 5(2), § 7(1)(j). Accordingly, whether a "free rider" effect exists depends on whether a non-union member public employee may obtain the benefits of union negotiations, and notwithstanding IP 35's prohibition on compelled payments to unions from non-members.

Under IP 35, a non-union member public employee may legally obtain the benefits of union bargaining without paying union dues or a "payment-in-lieu-of-dues." Under existing law and IP 35, a public employer may not "[i]nterfere with, restrain or coerce employees" who choose to not join a union. ORS 243.672(1)(a); IP 35, § 7(1)(a). A public employer can violate ORS 243.672(1)(a) if "the natural and probable effect of that action [deters] employees from exercising [the right to not join a union.]" *Portland Ass'n Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 623, 16 P3d 1189 (2000)

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(citation omitted)[3]; *see also 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"). In determining whether the "consequences" of a public employer's actions constitute a violation of ORS 243.672(1)(a), a court may consider "whether, objectively viewed, the action that the employer took under the particular circumstances would chill union members generally in their exercise of protected rights." *Portland Ass'n Teachers*, 171 Or App at 623. Here, under IP 35, if a non-union member public employee of an "appropriate bargaining unit" demanded the union-bargained employment terms offered to union members of that same unit, and, if a public employer were to reject that demand, the non-member would be presented with the following dilemma: (1) accept the public employer's offered (and less favorable) employment terms; or (2) join the union to obtain the union-bargained (and preferred) employment terms. The "natural and probable effect" of that dilemma is to encourage union membership (or, alternatively, to "chill" the non-union member's exercise of

[3] A public employer also violates ORS 243.672(1)(a) if the employer's adverse action is "motivated by the exercise of [the right to not join a union]." *Portland Ass'n Teachers*, 171 Or App at 623. That type of violation is not at issue in assessing the actual legal effect of IP 35.

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the right to not join a union). Thus, under IP 35, a non-union member public employee could demand and obtain union-bargained employment terms, and at the same time, refuse to pay union dues or a "payment-in-lieu-of-dues." Accordingly, IP 35 has a "free rider" effect, and that is the type of legal effect that should be included in the caption. *See, e.g.*, *Novick/Bosak v. Myers*, 333 Or 18, 26, 36 P3d 464 (2001); *Sizemore/Terhune v. Myers*, 342 Or 578, 588-89, 157 P3d 188 (2007); *Towers v. Rosenblum*, 354 Or 125, 131, 310 P3d 136 (2013).

3. Gibson's objection lacks merit.

In contending otherwise, Gibson argues that IP 35 does not include any "free rider" effect. (Gibson Pet, 4-10).[4] She contends that IP 35 is similar to IP 27 (2010), the ballot title of which did not identify any such "free rider" effect, *Caruthers v. Myers*, 344 Or 596, 189 P3d 1 (2008), and that *Caruthers* is "controlling." (Gibson Pet, 4-5). She further contends that the caption incorrectly identifies a "free rider" effect based on two incorrect assumptions.

[4] Chief petitioner correctly states that she previously objected only to the summary. (Gibson Pet, 4). However, in her letter, she objected that the entire ballot title failed to identify what she described as "the major focus and effect of IP 35"—"to give public employees the choice of whether or not to be a paying member of a union." (6/2/2015 Gibson Letter, 2). That objection was considered as an objection applicable to all parts of the ballot title, and not just the summary.

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First, she argues that IP 35 "takes nonmembers out of the collective bargaining process by amending 'collective bargaining' to exclude nonmembers" and that the caption incorrectly assumes that non-union member public employees would be in the same collective bargaining units as union-members public employees. (Gibson Pet, 6-7). Second, Gibson argues that public employers who offer different employment terms to non-union member employees would not violate ORS 243.672(1)(a), and that the caption improperly speculates to the contrary. (Gibson Pet, 7-10). However, Gibson's arguments are not persuasive.

First, Gibson's argument that *Caruthers* is "controlling" is incorrect. In *Caruthers*, no party raised the issue that is present in this case, that is, whether the initiative in question (IP 27 (2010)) included a "free rider" effect. Gibson's claim that *Caruthers* is controlling on a question this court did not answer is without merit. And for the reasons discussed above, IP 35 includes a "free rider" effect that must be included in the caption.

Second, Gibson's claim that IP 35 "takes nonmembers out of the collective bargaining process by amending 'collective bargaining' to exclude nonmembers" lacks merit. Gibson argues that because IP 35 changes the definition of "collective bargaining" to mean "the performance of the mutual

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obligation of a public employer and the representatives of its employees who have chosen to join a labor organization[,]" IP 35, § 3(4), that definitional change implicitly excludes non-member public employees from the definition of an "appropriate bargaining unit." (Gibson Pet, 6-7). However, under existing law, non-union member employees are part of an "appropriate bargaining unit," and IP 35 does not change the definition of an "appropriate bargaining unit." The possibility that under IP 35 a union may not engage in "collective bargaining" for non-union member public employees does not, in turn, mean that a union may not "bargain" (in some other form) for non-union member public employees in an "appropriate bargaining unit." Section 8 of IP 35, which provides that unions are not "required" to bargain for non-union member public employees, strongly implies that a union *may* "collectively bargain" (or "bargain" in some other form) for non-union member public employees in an "appropriate bargaining unit." Thus, Gibson's claim that IP 35 excludes non-union member public employees from an "appropriate bargaining unit" lacks merit.

Third, Gibson's argument that public employers may offer different employment terms to non-union member public employees without violating ORS 243.672(1)(a) does not, in turn, mean that the caption is inaccurate.

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Assuming for the sake of argument that it is possible under IP 35 for a public employer to offer a non-union member public employee a different set of employment terms without violating ORS 243.672(1)(a), that possibility is beside the point. Rather, the pertinent issue concerns whether IP 35 creates a legal effect that allows a non-union member public employee to request (and receive) the same employment terms that union member public employees receive, and without cost. As explained above, the answer is "yes", and it is not a speculative answer. Consequently, IP 35 includes a "free rider" effect that must be identified in the caption.

3. Winters' objections lack merit.

Like Gibson, Winters objects that the caption improperly identifies that IP 35 includes a "free rider" effect. (Winters Pet, 6). However, for the reasons explained above, that argument lacks merit.

In addition, Winters argues that the caption fails to identify that the "actual legal effect" of IP 35 is that it removes the legal requirement that a non-union member of an "appropriate bargaining unit" and a union are "forced" to "associate" with each other for collective bargaining purposes. (Winters Pet, 4-5). However, because there is a "free rider" effect in IP 35, IP 35 does not entirely remove any and all forced associations between a union and the non-

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union members of an "appropriate bargaining unit." To the contrary, and as explained above, non-union members may still obtain the union-bargained benefits, albeit indirectly, and without having to share in the costs of union representation. As such, it would be misleading for the caption to state or imply that IP 35 would sever compelled associations between a union and the non-union member employees in an "appropriate bargaining unit."

4. Vaandering and Darby's objections lack merit.

Vaandering and Darby argue that the caption is deficient in two respects. First, they argue that the phrase "may benefit" is misleading to the extent that it suggests that IP 35 "*might* change current law when, in fact, the proposal *will definitely* change current law [by creating a "free rider" effect.]" (Vaandering/Darby Pet, 6). Second, they argue that the term "representation costs" is "over-inclusive" because unions would not be required to "represent" non-union member public employees in individual disputes with public employers—and that the caption should "more accurately reflect that non-union member employees will receive union-negotiated benefits without sharing in the costs of *bargaining*." (*Id*. at 4, 6). They suggest that the caption should instead read: "Allows non-union public employees to receive union benefits

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while refusing bargaining costs; modifies representation obligations." (*Id*. at 8). However, neither argument has merit.

First, the phrase "may benefit" is not inaccurate or misleading. The term "may" is ordinarily understood as "have the ability or competence * * * to have permission to"). *Webster's Third New Int'l Dictionary* 1396 (unabridged ed 2002). The phrase "may benefit," when read in context with the entire caption, would be readily understood by voters as meaning that a non-union member public employee would have the legal ability or permission to obtain union-bargained benefits without having to pay union representation costs. That is particularly certain when the caption is read with the "yes" vote result statement, which reads "'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." The likelihood that a voter would interpret the caption as suggesting a "possible" change in the law rather than an actual change in the law is extremely unlikely.

Second, the caption should not substitute the term "bargaining costs" for "representation costs" as the former term is potentially under-inclusive. Petitioners admit that under IP 35, a non-union member public employee "*may* receive the benefit of certain grievances that are pursued in order to enforce [a

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collective bargaining agreement.]" (Vaandering/Darby, 6). That is, petitioners recognize that a non-union member employee "may benefit" from those union representation activities—and without any corresponding financial obligation owed to the union. However, an ordinary voter may not understand that such union representation activities, *i.e.* initiating a grievance, are a "bargaining cost." Indeed, it is probably not a "bargaining cost" even though it is the type of cost a non-union member public employee could avoid paying under IP 35. Accordingly, the caption is not inaccurate or misleading for identifying that a non-union member public employee may receive union benefits without paying "representation costs."

B. The Attorney General's vote result statements substantially comply with ORS 250.035(2)(b) and (c).

The two vote result statements are required to describe the results of approving and rejecting the measure. The statements are limited to 25 words. ORS 250.035(2)(b) and (c). A "yes" vote result statement must accurately describe in simple and understandable terms the result if the proposed measure is approved. *Mabon v. Myers*, 332 Or 633, 639, 33 P3d 988 (2001). A "no" vote result statement describes the result if the proposed measure is rejected. ORS 250.035(2)(c).

The Attorney General's vote result statements provide:

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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.

Both Gibson and Winters renew the arguments they made with respect to the caption. (Gibson Pet, 4; Winters Pet, 6-7). For the reasons explained above, IP 35 includes a "free rider" effect that should be identified in the vote result statements. Accordingly, their contrary arguments lack merit.

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

ORS 250.035(2)(d) provides that a ballot title summary be "[a] concise and impartial statement of not more than 125 words summarizing the state measure and its major effect." The function of the summary is "to provide voters with enough information to understand what will happen if the measure is approved." *Caruthers*, 347 Or at 670. That information may include a description of the effect of the measure at issue on other laws, so long as the description is accurate. *Berman v. Kroger*, 347 Or 509, 514, 225 P3d 32 (2009). In all events, the information must pertain to an identified, actual "effect" of enacting the measure; it is not permissible to "speculate about the

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(503) 378-4402

possible effects of a proposed measure." *Pelikan/Tauman v. Myers*, 342 Or 383, 389, 153 P3d 117 (2007). The Attorney General's summary provides:

> **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.

1. Gibson's objections to the summary are not well taken.

Gibson renews the arguments she made with respect to the caption. (Gibson Pet, 4). For the reasons explained above, those arguments lack merit.

2. Winters' objections to the summary are not well taken.

Winters first objects that the second sentence in the summary, which reads "Measure states that public employee union is not required to represent non-union public employees in bargaining unit (effect is unclear)." Winters contends that "[t]hat sort of commentary has no basis in a ballot title describing IP 35" because there is "nothing unclear" about IP 35, which purports to

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remove any requirement for a labor union to represent non-union members. (Winters Pet, 9). However, as explained above, because IP 35 contains a "free rider" effect, that is, a union may at least indirectly represent non-union members while representing union members in contract negotiation and contract enforcement matters. Accordingly, it is permissible and appropriate for the summary to identify that lack of clarity in the proposed law. *See Wolf v. Myers*, 343 Or 494, 504, 173 P3d 812 (2007) (the Attorney General may state that the effect of a measure is unclear "if that statement satisfies statutory requirements"); *Caruthers*, 344 Or at 602-03 (when there are multiple plausible interpretations of a proposed measure "the Attorney General should communicate the ambiguity to the voters") (citing *Wolf*).

Winters next objects to the third sentence in the summary, which provides that "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." Winters objects that that sentence unduly speculates about whether "non-members automatically benefit from union negotiations." (Winters Pet, 10). However, that argument is the same as those addressed above—that is, that it is speculative as to whether IP 35 includes a "free rider"

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effect. For the reasons explained above, IP 35 includes an actual and non-speculative "free rider" effect. Accordingly, the summary is not deficient in this regard.

E. Conclusion

For the reasons discussed above, the Attorney General's ballot title substantially complies with ORS 250.035(2) and the court should certify it without modification.

Respectfully submitted,

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

/s/ Matthew J. Lysne
MATTHEW J. LYSNE #025422
Senior Assistant Attorney General
Matthew.J.Lysne@doj.state.or.us

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

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 378-4402

Thomas Alicia F

From: PLUKCHI Lydia <lydia.plukchi@state.or.us>
Sent: Thursday, July 02, 2015 10:09 AM
To: THOMAS Alicia F
Subject: Initiative Petition #35 Appeal
Attachments: 035cbt.pdf; 035cmts.pdf; 035dbt.pdf

OFFICE OF THE SECRETARY OF STATE

JEANNE P. ATKINS
SECRETARY OF STATE

ELECTIONS DIVISION

JIM WILLIAMS
DIRECTOR

255 CAPITOL STREET NE, SUITE 501
SALEM, OREGON 97310-0722

(503) 986-1518

July 2, 2015

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

Via Email

Dear Ms. Joyce:

In accordance with ORS 250.067(4) please file the attached comments with the court as part of the record in the ballot title challenge filed by Jill Gibson and Margaret Olney on Initiative Petition **2016-035**. Also attached are the draft and certified ballot titles with their respective transmittal letters.

Sincerely,

Lydia Plukchi
Compliance Specialist

OFFICE OF THE SECRETARY OF STATE

JEANNE P. ATKINS
SECRETARY OF STATE

ELECTIONS DIVISION

JIM WILLIAMS
DIRECTOR

255 CAPITOL STREET NE, SUITE 501
SALEM, OREGON 97310-0722

(503) 986-1518

INITIATIVE PETITION

TO: All Interested Parties

FROM: Lydia Plukchi, Compliance Specialist

DATE: May 18, 2015

SUBJECT: Initiative Petition **2016-035** Draft Ballot Title

The Elections Division received a draft ballot title from the Attorney General on May 18, 2015, for Initiative Petition **2016-035**, proposed for the November 8, 2016, General Election.

Caption

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

Chief Petitioners

Jill Gibson 10260 SW Greenburg Rd, Suite 1180 Portland, OR 97223

Comments

Written comments concerning the legal sufficiency of the draft ballot title may be submitted to the Elections Division. Comments will be delivered to the Attorney General for consideration when certifying the ballot title.

Additionally, the Secretary of State is seeking public input on whether the petition complies with the procedural constitutional requirements established in the Oregon Constitution for initiative petitions. The Secretary will review any procedural constitutional comments received by the deadline and make a determination whether the petition complies with constitutional requirements.

To be considered, draft ballot title comments and procedural constitutional requirement comments must be received in their entirety by the Elections Division no later than 5 pm:

Comments Due	How to Submit	Where to Submit
June 2, 2015	Scan and Email	irrlistnotifier.sos@state.or.us
	Fax	503.373.7414
	Mail	255 Capitol St NE Ste 501, Salem OR 97310

More information, including the draft ballot title and text of the petition, is contained in the IRR Database available at **www.oregonvotes.gov**.

ELLEN F. ROSENBLUM
Attorney General

FREDERICK M. BOSS
Deputy Attorney General

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

May 18, 2015

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

Re: Proposed Initiative Petition — Public Employee Unions Not Required to Represent Non-Members; May Not Assess Non-Members for Representation Costs
DOJ File #BT-35-15; Elections Division #2016-035

Dear Mr. Williams:

We have prepared and hereby provide to you a draft ballot title for the above-referenced prospective initiative petition. The proposed measure relates to removing the requirement that public employee unions represent non-members, and removes the requirement that non-members pay representation costs.

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

A copy of the draft ballot title is enclosed.

Alicia Thomas
Legal Secretary

AFT/6507466

Enclosure

Jill Odell Gibson
10260 SW Greenburg Rd., Ste. 1180
Portland, OR 97223

Lee Vasche
18965 SW 84th Ave
Tualatin, OR 97062

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.

LINCOLN TOWER | 10260 SW GREENBURG RD, STE. 1100 | PORTLAND, OR 97223 | E JILL@GIBSONLAWFIRM.ORG | T 503.686.0486 | F 866.511.2586

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.

Jill Gibson

Eric Winters
30710 SW Magnolia Avenue
Wilsonville, Oregon 97070

June 2, 2015

The Honorable Jeanne Adkins
Secretary of State of Oregon
Attn: Elections Division
255 Capital Street NE, Suite 501
Salem, OR 97310

Re: Comments on Draft Ballot Title for #2016-035

Dear Ms. Adkins:

I submit these comments pursuant to ORS 250.067 as an Oregon elector not satisfied with the draft ballot title filed by the Attorney General. I request that the Caption, the Result of "Yes" Vote statement and the Summary be revised as follows to meet the requirements of ORS 250.035.

The Caption provided in the draft ballot title reads:

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

The proposed Caption reasonably identifies the subject matter of the proposed measure with one exception. The phrase "may not assess non-members for representation costs" could lead voters to make inaccurate inferences about how non-members are currently charged for payments-in-lieu-of-dues. ORS 243.650(10) defines these charges as "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...*" (emphasis added).

The "costs" assessed by exclusive representative to non-members under ORS Chapter 243 include collective bargaining and contract administration services that non-members may find subjectively objectionable. Non-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 the non-member that in many cases simply does not exist. The "services" charged to non-members are more appropriately understood as services provided by a union for all members of an appropriate bargaining unit (whether they want them or not). The appropriate bargaining unit may be collectively represented, but it is inaccurate to apply that language to individual non-members who may personally

object to such representation. The following caption more clearly states the proposed changes to the relationship between public employee unions and non-members:

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

The "Result of 'Yes' Vote" by the Attorney General should follow a similar tack to clearly notify the voters of the most important impact of the proposed measure. As the "Result of 'Yes' Vote" statement only uses twenty-three of twenty-five allotted words, I suggest the following:

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

The "Result of 'No' Vote" sufficiently describes the relationship between public employee unions and non-members as currently drafted.

The Summary begins with a misleading statement. Current law does not permit non-member "public employees to bargain collectively through a labor organization/union of their choosing as their exclusive representative." A majority of union members get to choose the exclusive representative for all employees within an appropriate bargaining unit (union or not). The first sentence of the Summary should be altered to clarify the current law as follows:

> **Summary:** Current law requires union members and non-members within an appropriate bargaining unit (ABU) of public employees to collectively negotiate employment terms when a majority of the ABU appoints a labor organization/union for that purpose; a labor organization/union cannot decline to represent non-members within an ABU; non-members can be required to pay the labor organization/union for the cost of union services provided to ABU members. Measure removes requirement that public employee unions represent non-members; prohibits requiring non-members to pay for costs associated with representing ABU members; union members must renew membership in writing annually. Measure applies to new, renewed, or extended contracts entered into after the effective date of the measure. Other provisions.

Thank you for considering these comments.

BENNETT, HARTMAN, MORRIS & KAPLAN, LLP

GREGORY A. HARTMAN
MICHAEL J. MORRIS
HENRY J. KAPLAN§
NELSON R. HALL
THOMAS K. DOYLE♦
ARUNA A. MASIH♦
SHARON MAYNARD
TALIA Y. STOESSEL
RICHARD B. MYERS

ATTORNEYS AT LAW
SUITE 500
210 S.W. MORRISON STREET
PORTLAND, OREGON 97204-3149
(503) 227-4600
FAX (503) 248-6800
www.bennetthartman.com

ROBERT A. BENNETT (RETIRED)
LINDA J. LARKIN*
MARGARET S. OLNEY*♦
PATRICIA A. ARJUN*♦
* OF COUNSEL
♦ ALSO MEMBER WASHINGTON BAR
§ ALSO MEMBER NEW YORK BAR

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KATE BROWN
SECRETARY OF THE STATE

June 2, 2015

Via email: irrlistnotifier@sos.state.or.us

The Honorable Jeanne Atkins
Secretary of State Elections Division
255 Capital Street NE, Suite 501
Salem, Oregon 97310-0722

Re. Initiative Petition 35 (2014) - Draft Ballot Title Comments
Our File No. 18600-45

Dear Secretary Atkins:

This office represents Hanna Vaandering and BethAnne Darby, Oregon electors and interested parties in Initiative Petition 35 (2016) ("IP 35"). Hanna Vaandering is the President of the Oregon Education Association and BethAnne Darby is the Assistant Executive Director for Public Affairs for the Oregon Education Association. We write to comment on the draft ballot title for IP 35.

1. INTRODUCTION

IP 35 is a statutory proposal to amend the Oregon Public Employee Collective Bargaining Act ("PECBA"). ORS 243.650 *et seq.* It is only the most recent of a long line of anti-union initiatives that have been filed over the years, designed to allow public employees who are in a bargaining unit represented by a union to receive the benefits of that representation without sharing in the cost. *See, e.g.* IP 9 (2014), IP 20 (2008), IP 48 (2008), IP 50(2002).[1] The ballot titles for those initiatives have been subject to Supreme Court review and must therefore guide the Attorney General in this case. *See, e.g. Towers v. Rosenblum*, 354 Or 125, 310 P3d 136 (2013), *Sizemore v. Myers*, 342 Or 578, 157 P3d 188 (2007); *Crumpton v. Kulongoski*, 319 Or 83, 873 P2d 314 (1994), *Dale v. Kulongoski*, 321 Or 108, 894 P2d 462 (1995), *Sizemore v. Kulongoski*, 319 Or 82, 873 P2d 314 (1994). In each of those cases, the court emphasized that the ballot title must explain the "free rider" concept in order to comply with the statutory standards. Most recently, in reviewing the Attorney General's certified ballot title for IP 9 (2014), the Oregon Supreme Court reiterated the point:

1 Chief Petitioner, Jill Gibson, has also submitted IP 36. Although worded differently, it is functionally the same as IP 35. Accordingly, the ballot title for the two initiatives should be similar. *See* ORS 250.062.

> This case is controlled by our prior decisions in *Novick/Bosak* and *Sizemore/Terhune.* As in both of those cases, the measure at issue in this one would, if adopted, declare a right not to be required to join a labor organization as a condition of employment and a right not to pay dues, fees, or other charges to such labor organizations. As in both of those cases, an "actual major effect" is that employees who choose not to be represented will be able to receive services from a labor organization without having to pay for them. And, as in both of those cases, the Attorney General's certified ballot title caption is deficient for failing to identify that actual major effect.

Towers v. Rosenblum, 354 at 130-31.

In order to avoid a similar ballot title, IP 35 purports to eliminate the union's duty to represent bargaining unit members who chose not to join the union. Section 8. However, as discussed below, the free rider problem persists. The PECBA establishes a complex bargaining system with many interrelated parts. Even if, in some semantic sense, IP 35 eliminates a union's duty to provide "representation services" to non-union employees, the parts of the PECBA that remain will ensure that all bargaining unit employees will receive the same wages, benefits and other terms and conditions of employment, regardless of membership. As a consequence, non-member employees in the bargaining unit would still be entitled to receive the primary benefit of union representation without sharing the costs of collective bargaining.

As discussed below, the draft ballot title fails to identify this actual effect and otherwise overstates the changes made by IP 35. Rather than examine the proposal's actual effect in light of existing law, it simply restates the words of the proposal. This is unacceptable. To comply with clear Oregon Supreme Court precedent, the ballot title must alert voters to the fact that employees will still receive the benefits of union representation without sharing in the cost of that representation.

Below, commenters will first review the key labor law principles at play in this initiative. We will then address the specific shortcomings of the draft ballot title.

2. CURRENT LEGAL FRAMEWORK

Oregon's Public Employee Collective Bargaining Act (the PECBA) was enacted in 1973. ORS 243.650 *et seq* . Like its federal counterpart in the National Labor Relations Act ("NLRA"), the PECBA establishes a system under which employees can elect to have a union represent them. The Oregon Employment Relations Board ("ERB") is responsible for enforcing the PECBA, through both rulemaking and contested case proceedings. ORS 243.766.

A. Appropriate Bargaining Unit

The first step in the process is for a union to be certified or recognized as the exclusive bargaining representative of an "appropriate bargaining unit" of employees. The statute gives ERB the authority to define the appropriate bargaining unit. ORS 243.682. In making that determination, ERB considers a variety of factors, including "community of interest, wages, hours, working conditions of the employees involved, history of collective bargaining and the desires of employees. ORS 243.682; OAR 115-025-0050(1) (further defining "community of interest" to include "similarity of duties, skills, benefits, interchange or transfer of employees, promotional ladders, common supervisor, etc."). Typically, the scope of the bargaining unit is defined primarily by job classifications (i.e., all teachers, nurses and other professional staff who are licensed by a professional board). *See, e.g.,* http://www.pps.k12.or.us/departments/laborrelations; http://www.oregon.gov/DAS/CHRO/pages/cbas.aspx; https://multco.us/employee-labor-relations/labor-contracts; https://www.portlandoregon.gov/bhr/27840. Status as a full-time or temporary employee is another common distinguishing factor. *Id.; see also, Labor and Employment Law: Public Section,* OSB CLE 2011, Chapter 3. As discussed below, under well-established law, an employee cannot be required to join the union, but employees who are included in the bargaining unit description remain bargaining unit members even if they choose not to join.

B. Union's Duties as Exclusive Bargaining Representative

Once the appropriate bargaining unit is defined and a majority of the employees in that unit chose to be represented, the law imposes a number of rights and responsibilities on both the union and the employer. First, the union becomes the exclusive bargaining representative for all employees in the unit. *Carlson v. AFSCME,* 73 Or App 755, 758, 700 P2d 260, *rev. den.* 300 Or 332 (1985). In that capacity, it must fairly represent all members of the bargaining unit without hostility or discrimination, regardless of union membership. Often referred to as the "duty of fair representation," this duty is grounded in ORS 243.672(2)(a), which makes it unlawful for a union to "interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under ORS 243.650 to 243.782." *Putvinskas v. SWOCC Classified Federation, AFT and SWOCC,* 18 PECBR 882, 894 (2000); *See also, Vaca v. Sipes,* 396 US 171, 64 LRRM 2369 (1967) and *Airline Pilots v. O'Neill,* 499 US 65, 136 LRRM 2721 (1991). The right to choose whether or not to join the union is a core protected right under both constitutional and statutory labor law principals. U.S. Const., Am. 1; ORS 243.662; *see also, Sizemore v. Myers/Terhune, supra; Dale v. Kulongoski, supra.* The duty applies to representation both for negotiations and contract enforcement and exists independently of any desire by a bargaining unit member to receive representation.

C. Employer's Duties to Not Treat Bargaining Unit Members Differently Based on Union Activity or Status

The law also imposes significant obligations on employers once a union is recognized. In addition to the key obligation to bargain in good faith, the PECBA prohibits differential treatment of employees based on protected union activity. ORS 243.672(1)(a),(b) and (c). Broadly speaking, those provisions prohibit employers from (1) taking action "because of" an employee's exercise of protected rights, (2) taking actions that have the "natural and probable effect" of interfering with the exercise of protected rights; or (3) taking actions for the purpose of encouraging or discouraging union membership. *See, Labor and Employment Law: Public Sector*, OSB CLE 2011, Chapter 8 for overview of union anti-discrimination laws. While most cases challenge detrimental or adverse action by the employer, promises of favoritism can also be unlawful. *ONA v. OHSU*, 19 PECBR 590, 594 (2002) ("the natural and probable effect of offering bargaining unit members bonus pay to forgo the strike would be to interfere with or coerce them in choosing whether or not to exercise a statutory right."); *OPEU v. Jefferson County*, 18 PECBR 128, 138 n 4 (1999); *Portland Ass'n of Teachers v. Multnomah County School Distr., No. 1*, 171 Or App 616, 626 (1997). In addition, it is not necessary to prove that the employer was motivated by actual or subjective anti-union animus. *Wy'East Educ. Ann'n v. Or Trail Distr. No. 46*, 244 Or App 194, 207, 260 P3d 626 (2011); *Portland Ass'n of Teachers v. Multnomah County Sch. Dist. No. 1*, 9 PECBR 8635, 8646 (1986). Rather, the nexus between the employer's action and protected activity can be inferred by timing and other circumstantial evidence. *Portland Ass'n of Teachers v. Multnomah County Sc. Dist., No. 1*, 171 Or App at 624.

D. Fair Share Agreements

Because the law places significant duties on unions towards all bargaining unit members, the PECBA allows public employee unions to negotiate provisions in collective bargaining agreements to require all covered employees to pay their fair share of representation costs. ORS 243.666. Under a "fair share agreement," union members pay dues, non-union members pay fees-in-lieu-of-dues. ORS 243.650(10) and (18).[2] These agreements are allowed in order to avoid the "free rider" problem. *See*, Hardin, *The Developing Labor Law*, 3rd Ed. (1992), Chapter 26 and cases cited therein. As the U.S. Supreme Court explained in the leading case on the subject:

> The designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money. The services of lawyers, expert negotiators, economists, and a

[2] In the private sector, these agreements are generally referred to as "union security" agreements.

> research staff, as well as general administrative personnel, may be required. Moreover, in carrying out these duties, the union is obliged "fairly and equitably to represent all employees, . . . union and non-union," within the relevant unit. *A union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become "free riders" – to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees.*

Abood v. Detroit Board of Education, 431 U.S. 209, 97 S. Ct. 1782, 52 L.Ed.2d 261, 95 LRRM 2411, (1977) (Citations omitted, emphasis added.) To ensure that employees are not required to pay for political or ideological activities to which they may have objections, the law requires all unions to follow a specific and detailed procedure that protects non-members rights. *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Elvin v. OPEU*, 11 PECBR 9 (1988), *aff'd*, 102 Or App 159 (1990), *aff'd*, 313 Or 165 (1992).

As discussed in more detail below, IP 35 would fundamentally alter this carefully balanced statutory scheme, to the detriment of all players except bargaining unit members choosing not to join the union. Those non-members would still receive the "benefits of union representation" with regard to collective bargaining, but without sharing in the cost of that activity. Unfortunately, the draft ballot title totally fails to identify this major subject and contains other inaccuracies. It must be substantially modified.

3. CHANGES MADE BY IP 35

A. Fair Share Agreements

IP 35 eliminates the ability of public employers and their unions to negotiate fair share agreements. Section 2 provides: "Compulsory payments to labor organizations by public employees who choose to not join a labor organization shall be prohibited." Section 3 deletes the definition of "fair share agreement" and "payment-in-lieu-of-dues" from the definitional section of the PECBA, ORS 243.650. Section 4 amends PECBA's policy statement, ORS 243.656, to state that it is the purpose of the act to "protect the right and freedom of public employees to choose whether or not to join a labor organization" as well as to "prohibit compulsory payment to labor organizations." Section 5 provides that "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." Finally, section 7 makes it an unfair labor practice for either an employer or union to enter into a fair share agreement.

B. Changes to Representation Obligations

In an attempt to obfuscate the free rider problem, IP 35 also purports to eliminate the union's duty to represent bargaining unit members who choose not to join the union. Section 8 provides the following:

> (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 3 also inserts the phrase "who have chosen to join a labor organization" into the definition of "certification," "collective bargaining," and "exclusive bargaining representative." Relatedly, Section 6 amends ORS 243.666, to state that a union certified by ERB or recognized by a public employee union is the exclusive representative of employees "who annually indicate in writing that they choose to join and be represented by a labor organization." However, IP 35 does not change any of the PECBA provisions relating to representation matters, *i.e.*, the procedures for becoming the exclusive bargaining representative in the first place or for determining the appropriate bargaining unit. *See* ORS 243.682 – 243.692. Nor does it change any of the provisions in ORS 243.672 that make it an unfair labor practice for either an employer or union to treat employees differently based on protected activity. ORS 243.672(1)(a) (b) and (c) and ORS 243.672(2)(a).

It is unclear what impact these definitional changes have. Proponents may argue that by electing not to join the union, these non-union members are not actually in the bargaining unit or otherwise covered by the PECBA. This argument is circular and should be rejected. An employee can only choose *not* to join the union if he or she has the option to be in the union in the first place -- i.e., the employee is in a position that is within the bargaining unit which the union represents. This is a threshold question that cannot turn on *who* is in the position, but rather the position itself. Stated differently, the scope of the bargaining unit is constant and does not change depending on the individual choices of covered employees on whether to join the union.

If an employee is in the bargaining unit, it follows that he or she will receive all of wages, benefits and other terms and conditions of employment that the union negotiates on behalf of the bargaining unit employees. This is a necessary corollary of being the exclusive bargaining representative and a fundamental principal of collective bargaining.

It is also unlawful to negotiate or pay different wages, benefits and other employment terms to bargaining unit members based on whether or not they are in the union. This is so, notwithstanding Section 8, because of the PECBA's anti-discrimination provisions. As discussed above, to ensure that

employees are able to exercise their protected rights under the PECBA free from coercion, the statute makes it unlawful for either an employer or union to treat employees differently "because of" their membership status, or to take any action that would have the "natural and probable effect" of encouraging or discouraging protected activity, including union membership. ORS 243.672(1)(a) and (c); ORS 243.672(2)(a). Those provisions are not changed by IP 35. Coupled with the elimination of fair share agreements, this means that non-union bargaining unit employees will, by necessity, receive the benefits of collective bargaining without sharing in the costs. The free rider problem remains. An example illustrates the point.

Assume a bargaining unit made up of classified staff employed by a school district. *See, e.g.* http://www.salkeiz.k12.or.us/sites/default/files/salkeiz/classified-bargaining-agreement-2014-16_Updated.pdf. Assume further that there are employees in each job classification who choose not to join the union. Under IP 35, the union theoretically has no obligation to bargain on behalf of those employees. But what does that actually mean? The union must bargain wages and benefits for its members in each of those job classifications. As part of that bargain, ORS 243.672(2)(a) prohibits the union from even seeking a provision that requires the employer to provide a different wage to non-members. This means that as a practical matter, the union must, in fact, negotiate on behalf of all bargaining unit members, regardless of their membership status.

Similarly, although the employer is not *contractually* required to pay the same wages and benefits to non-members, it must do so in order to avoid charges that it is committing an unfair labor practice by discriminating against employees based on their union membership. Simply put, an employer who pays either lower or higher wages to bargaining unit employees because they are not in the union violates both ORS 243.672(1)(a) and (c). Clearly, the employer has treated the employees differently "because of" their protected activity (choosing not to join the union). Equally clearly, the "natural and probable effect" of that different treatment is to either *encourage* union membership (if non-members get lower wages and benefits) or *discourage* union membership (if non-members get better wages and benefits.). *See, e.g. ONA v. OHSU, supra.* In either scenario, the employer has acted unlawfully.[3] Accordingly, the only action it can take is to provide the same terms and conditions of employment to non-members. And, because IP 35 prohibits fair share agreements, those non-members will not share in the cost associated with bargaining those employment terms.

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[3] As a remedy, the employer would be required to pay the higher wages and benefits to all employees in the bargaining unit. *ONA v. OHSU*, Order on Remedy, 19 PECBR 684, 687 (2002) ("Requiring OHSU to pay the incentive in the same manner to the strikers [as had been done to strikebreakers] would help to undo the coercive impacts of its earlier unlawful action. More importantly, however, such a payment is the only practical way to restore equality between strikers, who did not receive [the incentive], and nonstrikers, who did. * * * It would be both impractical and illogical to require OHSU to recoup the unlawfully paid incentive from nonstrikers – that would shift the burden (economically at least) of OHSU's unlawful conduct to the nonstrikers, a result inconsistent with the policies of the PECBA.")

Note that commenters acknowledge that IP 35 may make some changes to the duty of fair representation – but to what degree and exactly how is unclear. Section 8 can reasonably be read to mean the union would no longer have a contractual or legal obligation to represent non-members in individual disputes with employers. Thus, if an employer disciplined an employee for misconduct, the union would have no obligation to grieve the case.[4] But even in the area of contract enforcement, it is an overstatement to suggest that non-members would receive none of the benefits of union actions. Many grievances and arbitrations are pursued to protect contractual rights that benefit all members of the bargaining unit. For example, an arbitrator recently found that Portland Public Schools had improperly increased workload for high school teachers. As a remedy, high school teachers received compensation for the excess workload, and the District was ordered to develop a schedule that reduced workload. http://www.oregonlive.com/education/index.ssf/2015/05/portland_public_schools_to_pay.html. Non-members would be entitled to the same workload relief, even though they did not share in the cost of either negotiating or enforcing the contractual workload limits. Otherwise, both the union and the employer could be found guilty of an unfair labor practice.

In sum, IP 35 does not eliminate the free rider problem. Bargaining unit members who choose not to join the union will continue to receive the majority of the benefits of union representation for free. The union would see some small reduction in representation obligations, but only as to individual grievances that do not impact the bargaining unit at large. And employers will experience substantial uncertainty, expense and liability in their dealings with non-union bargaining unit members.[5]

4. DRAFT BALLOT TITLE

A. Caption

ORS 250.035(2)(a) provides that a ballot title contain "a [c]aption of not more than 15 words that reasonably identifies the subject matter of the state measure." The caption is the "headline" or

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[4] While the union may not have to represent the individual, the employee may nonetheless be entitled to the substantive protections of just cause, since that is a term and condition of employment that cannot be diminished based on union membership without violating ORS 243.672(1)(a) and (c). It is not clear how those rights would be enforced – perhaps the employer would have to offer binding arbitration to non-members or perhaps the non-member could bring a claim before ERB or a court.

[5] IP 35 creates more questions than answers. For example, most collective bargaining agreements are for multiple years. Yet IP 35 gives employees the choice to not join the union and be represented by the union on an annual basis. What happens if an employee joins the union in year one of the contract, but does not in year two? What kind of tracking of union membership status will the employer be required to follow? Is an employee who is disciplined covered by protections contained in the collective bargaining agreement or obligations derived from the nondiscrimination provisions of the statute? What is the proper enforcement forum? What restrictions can the union place on when a non-member joins? There are no clear answers and the ballot title cannot suggest otherwise.

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

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

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

There are two main problems with this caption. First and foremost, the draft caption utterly fails to tell voters the "true subject" or "actual effect" of the proposal – to allow employees choosing not to join the union to receive the benefits of that representation without cost. This is a fatal flaw. The Oregon Supreme Court has repeatedly directed the Attorney General to look behind the words of a measure to determine the proposal's "actual effect." *Rasmussen, supra.* The draft caption does not do so.

Prior Supreme Court cases dealing with "right to work" proposals demonstrate this methodology. In those cases, even though the words of each initiative primarily dealt with the elimination of fair share payments, the court repeatedly admonished the Attorney General to determine what the text actually meant in the context of existing law. More specifically, even if a proposal made other changes to labor law, if the actual effect of the proposal was to allow free riders, that subject needed to be in caption as well in order to comply with the statutory standards. *See, e.g., Towers v. Rosenblum, supra,* and cases cited therein.

For example, in *Sizemore/Terhune v. Myers*, 342 Or 578, 157 P3d 188 (2007), the court held that the ballot title for a similar "right to work" initiative was deficient because it failed to identify the free rider concept. The court examined the initiative in the context of existing law and identified the two legal changes that needed to be addressed in the caption. The first was the elimination of "any employment condition requiring any person to pay money to a union." The second flowed from the first: the proposal would entitle "employees to receive the union's legally mandated representation services without sharing in the cost of those services." *Id* at 588-89. The same analysis applies here. While a union's "duty" to represent non-members may be changed, its legal obligation to bargain wages, benefits and other terms and conditions of employment for bargaining unit members does not. This necessarily means that those non-members will receive the benefits of legally mandated collective bargaining services without cost.

Similarly, in *Towers v. Rosenblum*, 354 Or 125, 310 P3d 136 (2013), the court rejected a ballot title that yet again failed to clearly identify the free rider issue. The certified caption read, "Prohibits compulsory payment of union representation costs by public employees choosing not to join union." In that case, the Attorney General argued that her caption clearly identified the proposal's subject matter – the prohibition on requiring "payments-in-lieu-of-dues" – i.e., the facial changes made by the proposal. The court rejected that argument, emphasizing that prior decisions were clear that the Attorney general must examine the actual effect. 354 Or at 130-31. In response, the Attorney General issued the following ballot title, which the Supreme Court approved after rejection Chief Petitioner's objection:

> Allows non-union member public employees receiving required union representation to refuse to share representation costs.

As discussed below, the caption for IP 35 should parallel that approved for IP 9.

The second, related problem with the caption is that the phrase, "public employee unions not required to represent non-members" is inaccurate and misleading. While it is true that Section 8 changes a union's "duty of fair representation," as discussed above, what that actually means is unclear. The union may not have a "duty" to bargain on behalf of non-members, but those non-union bargaining unit members will still receive union-negotiated wages and benefits, which is a type of representation. In addition, a union is still prohibited from treating non-members differently than members under ORS 243.672(2)(a). Harmonizing the purported elimination of the "duty to represent" set out in Section 8, with ORS 243.672(2)(a) will be a task for ERB and the courts, with the outcome anything but clear. This means that the only clear thing the caption (and remainder of ballot title) can tell voters is that the proposal "changes" the union's bargaining obligations.

This conclusion is supported by the Supreme Court's decision *Caruthers v. Myers*, 344 Or 596, 602, 189 P3d 1 (2008). In that case, the court grappled with an initiative that purported to change representation obligations and union security provisions in both the public and private sector. In discussing the impact of the theoretical elimination of the duty to represent in the public sector, the court held that the impact was unclear, a point which the Attorney General conceded "may well be correct." Accordingly, the court rejected the phrase "union not required to represent nonmembers." Ultimately, the modified caption used the phrase, "changes public employee obligations to nonmembers" and the summary included the statement "Effect on public sector unions' obligation to represent nonmembers unclear." [6]

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[6] Because of the differences between IP 35 and IP 27 (2008), the modified caption for IP 27 would not be acceptable. It read: "Prohibits requiring employees to share union representation costs; changes public employee union obligations to nonmembers." The first clause refers to all employees, and not just "public employees." Furthermore, the first clause does not adequately or accurately describe the free rider problem at play here, as required by the Supreme Court

To correct these deficiencies, the Attorney General should use the ballot title approved for IP 9 as a starting point. That caption has already been through the crucible of a lengthy ballot title process and Supreme Court review. It is possible to do so by slightly modifying the language in order to accurately describe the current free rider problem and changes in representation obligations. We propose the following:

> **Allows non-union public employees to receive union benefits while refusing bargaining costs; modifies representation obligations**

This proposal is accurate and does not overstate the free rider issue. The reference to "bargaining costs" focuses voters' attention on the subset of representation that all covered employees will continue to receive for free – the costs of bargaining collective bargaining agreements that benefit all bargaining unit members. In this context, the phrase "union benefits" plainly refers to the specific benefits of collective bargaining – i.e., the wages, benefits and other terms and conditions of employment – a point which can be expanded on in the "yes" vote result statement. Finally, the phrase "modifies representation obligations" accurately alerts voters to the fact that the proposal purports to change a union's duty of representation, without overstating the actual impact. That is, as discussed above, it is plainly inaccurate and misleading to say that the proposal eliminates all "representation obligations" – the most that can be said is that it changes those duties. We urge that it be adopted.

B. Result of "Yes" Vote

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

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

> 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.

This draft statement suffers from the same shortcomings as the caption. First, the phrase "decline representing non-members" is inaccurate and overbroad. While IP 35 may change a

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in *Towers, supra*. Voters need to be told that nonunion bargaining unit employees will still receive the benefits of union representation with regard to collective bargaining without sharing in the costs of bargaining.

union's *duty* to represent non-members in certain contexts, the non-discrimination provisions that remain mean that non-members will receive representation services – i.e., the benefits of collective bargaining. Second, the statement fails to identify the free rider concept.

Finally, the statement regarding annual membership is neither accurate nor necessary. Section 5 of the proposal simply says that employees who choose not to renew annually cannot be required to pay dues or payments-in-lieu-of dues. And Section 6 purports to say that covered employees are only in the bargaining unit (*i.e.*, represented by the exclusive bargaining representative) if they renew annually. These provisions may change how the union collects payments from members (i.e., membership renewal *procedures*), but it does not necessarily change membership *status*. It is also a secondary detail that need not be in the result statement. *See, e.g. Dale v. Kulongoski*, 321 Or 18, 894 P2d 464 (1995) (certified ballot title did not reference annual renewal of membership until the summary).

In sum, under *Novick v. Myers, supra,* it is essential that the "yes" vote result statement clearly describe the changes that would be of "greatest importance" to voters. Here, there are two significant changes which must be included: (1) the fact that non-union member employees will receive the benefits of collective bargaining without sharing in the costs of that representation and (2) the fact that the proposal changes a union's representation duties. The following alternative builds on the caption and clearly explains both of these changes:

> **RESULT OF "YES" VOTE:** "Yes" vote allows public employees in union-represented bargaining unit to refuse to share cost of bargaining wage/benefits they receive; modifies union's representation obligations.

Notably, these statements provide additional detail regarding the free rider concept in order to avoid confusion. They also do not overstate the scope of the changes made to a union's representation obligations.

C. Result of "No" Vote

ORS 250.035(2)(c) requires that the ballot title contain a "simple and understandable statement" of up to 25 words, explaining "the state of affairs" that will exist if the initiative is rejected, that is, the *status quo*. It is also essential that the law described in the "no" vote result statement concern the subject matter of the proposal. Otherwise, the description could mislead voters about the effect of their vote. *Nesbitt v. Myers*, 335 Or 219, 223, 64 P3d 1133 (2003). Finally, it is generally impermissible for the "no" result statement to simply state that a "no" vote rejects the "yes" vote. *Nesbitt v. Myers*, 335 Or 424, 431, 71 P3d 530 (2003).

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

> **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

This description of current law is significantly different from that certified by the court for IP 9 and less clear.[7] For example, the fact that non-members will continue to receive the benefits of collective bargaining is based on the fact that they are in union-represented bargaining units. The statement should include a description of the status quo that reflects this threshold requirement. The statement certified for IP 9 does so by referencing "union-represented public employees;" the draft statement does not. Second, the draft statement is misleading when it qualifies the current scope of a union's representation obligations to "non-members." Unions have obligations to everyone in the bargaining unit – both members and non-members. The "no" vote result statement for IP 9 more clearly references this law and need not be changed.

The Attorney General may have decided to revise the statement in order to accommodate a reference to current law regarding membership. As discussed above, this is a secondary change made by the proposal – with an unclear impact. It need not be referenced in the "yes" statement and therefore, should not be referenced in the "no" statement. Moreover, the statement "membership renewals not required" grossly oversimplifies a complicated area of the law. For example, "membership renewals not required" for what? In short, the phrase is neither accurate nor necessary and should be omitted. We propose the following statement, which is identical to IP 9.

> **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. Summary

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

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7 The "no" vote result statement for IP 9 read:

> "Result of "No" Vote: "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."

The draft summary reads:

> **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 draft summary does a much better job than other portions of the ballot title in describing the measure, but must still be modified in order to substantially comply with the statutory standards. It appropriately describes current law by tracking the summary for IP 9. It can be improved by alerting voters to the two broad types of representation -- negotiations and contract enforcement. This detail is helpful because IP 35 does not actually change a union's obligation to bargain on behalf of all bargaining unit employees. The description of the duty of fair representation can also be improved by stating that the duty applies to all bargaining unit members, regardless of membership. Our alternative language does so in a clearer manner than the draft summary.

Regarding the description of how IP 35 would work, there are three changes that must be made. First, the summary should tell voters that the impact of the change in representation obligations is "unclear." The court previously approved of that approach in *Caruthers v. Myers, supra* (modified summary included the following sentence: "effect on public sector union's obligation to represent non-members is unclear"). Second, the sentence describing the elimination of fair share agreements needs to also describe the free rider problem. Finally, the phrase "union members must renew membership annually" should read "changes annual membership renewal procedures." As discussed above, the provisions relating to annual authorization are unclear with regard to effect, which must be reflected in the summary.

We propose the following:

> **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 condition of public employment; requires union to fairly represent (in negotiations

> and contract enforcement) all employees in bargaining unit, regardless of union membership; allows collective bargaining agreements requiring public employees who choose not to join union to share the costs of legally required union representation. Measure states that public employee unions need not represent non-members, effect unclear; prohibits requiring non-members to share in costs of representation, including cost of negotiating agreements that set wages/benefits received by non-members; changes membership renewal procedures. Measure applies to new, renewed, or extended contracts entered into after the effective date of the measure. Other provisions.

Wordspace for the additional concepts was found through editorial changes.

5. CONCLUSION

We recognize that the ballot title drafting process is challenging in light of the short timelines. This is particularly the case for initiatives like IP 35 which seek to change an incredibly complex area of the law in a manner primarily designed to obtain a different ballot title than those approved by the court for functionally similar proposals. As discussed above, the fundamental effect of the proposal is the same as in IP 9. Accordingly, commenters respectfully request that the Attorney General substantially revise the ballot title to accurately describe the free rider problems and the unclear nature of any changes in a union's duty representational obligations.

Thank you for your careful consideration of these comments.

Sincerely,

Bennett, Hartman, Morris & Kaplan, LLP

MSO:
cc: Clients

STOLL BERNE

STOLL STOLL BERNE LOKTING & SHLACHTER P.C. LAWYERS

Steven C. Berman
sberman@stollberne.com

RECEIVED
JUN 2 PM 4 41
KATE BROWN
SECRETARY OF THE STATE

June 2, 2015

VIA EMAIL

Jeanne Atkins
Secretary of State
Elections Division
255 Capital Street NE, Suite 501
Salem, OR 97310

Re: Initiative Petition No. 35 for the General Election of November 8, 2016

Dear Secretary Atkins:

I represent Heather Conroy regarding the ballot title for Initiative Petition No. 35 for the General Election of November 8, 2016 (the "Initiative"). Ms. Conroy is an elector in the State of Oregon and the Executive Director of Service Employees International Union Local 503. This letter is written in response to your office's press release, dated May 18, 2015, which invites comments on the draft ballot title for the Initiative.

Ms. Conroy respectfully submits that the caption, results statements and summary for the draft ballot title do not meet the requirements of ORS 250.035(2). Of most substantial concern is that the Initiative will allow non-union member public employees to receive the benefits of collective bargaining without sharing in the costs of collective bargaining. In other words, the Initiative creates a "free-rider" situation. However, the caption, results statements and summary fail to mention the free-rider issue.

The Oregon Supreme Court, repeatedly and consistently, has held that when a proposed initiative would amend the Oregon Public Employee Collective Bargaining Act, ORS 243.650, *et seq.*, ("PECBA") to allow for free riders, that is a predominant effect and result that *must* be addressed in the caption, results statements and summary. *See, e.g., Towers v. Rosenblum* 354 Or 125 (2013); *Sizemore v. Myers*, 342 Or 578 (2007); *Novick v. Myers*, 333 Or 18 (2001); *Dale v. Kulongoski*, 321 Or 108 (1995). Because the Initiative will create free riders – by prohibiting non-union members from making "fair share" payments while still requiring public employers to provide non-union members with wages, benefits and conditions of employment as good as those negotiated for union members – the free-rider concept is a major effect of the Initiative that must be addressed throughout the ballot title. Ms. Conroy requests that Attorney General certify a ballot title that corrects that deficiency, and others, so that the ballot title substantially complies with the statutory requirements.

209 SW OAK STREET, SUITE 500 PORTLAND, OR 97204 TEL (503) 227-1600 FAX (503) 227-6840

I. An Overview of Applicable Law

Two aspects of current law are relevant here. First, PECBA provides for fair share agreements (or payments-in-lieu-of-dues) for public employees who choose not to become union members. As the Oregon Supreme Court explained in *Novick*:

> "Under current law, unions and employers may negotiate union security agreements that, in one form or another, require bargaining unit employees who are not union members to pay for the cost of union representation."

333 Or at 26 (citation omitted). Without "fair share" payments, "public employees who do not join a union [would] become 'free riders,' by securing bargaining and representation services without cost." *Dale*, 321 Or at 111-112 (footnote omitted). "In practical terms, a prohibition on such agreements enables those employees to receive union representation without cost and represents a significant change in Oregon law." *Novick* 333 Or at 2 (citation omitted). That significant change must be addressed in the ballot title. *Id. See also Sizemore*, 342 Or at 588-589 (reaching same conclusion); *Towers*, 354 Or at 130-131 (same). As is set forth below, the Initiative seeks to eliminate fair-share payments.

The second aspect of current law relevant here is that it is an unfair labor practice for a public employer to treat union-member and non-union member public employees in the same bargaining unit differently. In other words, it is a violation of law for two public employees with the same job to receive different terms, conditions or benefits of employment because one belongs to a union and one does not. ORS 243.672(1)(a)-(c); ORS 243.672(2)(a). *See, e.g., Oregon Nurses Association v. Oregon Health & Science University*, 19 PECBR 590, 602 (2002) (Employment Relations Board finding public employer committed unfair labor practice by offering union and non-union members different terms of compensation). The Initiative does *not* change any of those provisions of law.

Because the Initiative prohibits fair-share payments, but still requires that union members and non-union members be treated similarly by public employers, the impact of the Initiative would be to allow non-union member employees to benefit from the collective bargaining agreements entered into between their public employer and a public employee union. That presents the same free-rider scenario – as to wages, benefits and conditions of employment – that the Court has addressed again and again. The case law is unambiguous. That free-rider issue must be addressed – front and center – in the caption, results statements and summary.

II. An Overview of Initiative Petition No. 35

The Initiative amends PECBA. The Initiative prohibits fair-share payments by non-union member public employees. Section 2 prohibits "[c]ompulsory payments to labor organizations by public employees who choose not to join a labor organization." Section 3 deletes the definitions of "fair-share agreement" and "payment-in-lieu-of-dues" in ORS 243.650(10) and ORS 243.650(18). Section 4 amends ORS 243.656(5) to "prohibit compulsory payments to labor organizations by public employees who chose not to join a labor organization." Section 5 adds a new subsection (2) to ORS 243.662, which provides that public employees who do not join labor organizations "shall not be required to pay dues or payments-in-lieu-of-dues." Section

7 makes it an unfair labor practice for a public employer, public employee union or public employee to enter into a collective bargaining agreement that requires non-union member public employees to make payments-in-lieu-of-dues. Initiative, §§ 7(1)(j), 7(2)(h). When read together, sections 2 through 7 of the Initiative ostensibly remove a non-union member public employee's obligation to make payments-in-lieu-of-dues. However, the Initiative does not revise those provisions of PECBA that prohibit a public employer from providing different employment terms to union and non-union members. *See* ORS 243.672(1)(a)-(c) (so providing). In other words, while the Initiative eliminates fair-share payments, it does not change the requirement that a public employer must treat union and non-union members equally in regards to terms, conditions and benefits of employment.

Section 8 adds a new provision to PECBA. Section 8 provides that "[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 services." Section 8 defines "representation services" as "representation regarding employment relations." Section 8 does not amend those provisions of ORS 243.672 that prohibit a public employer from treating union and non-union member employees differently regarding terms and conditions of employment (including wages).

Because nothing in the Initiative amends a public employer's obligation to treat union and non-union members the same, the predominant effect of the Initiative is similar to the predominant effect of the initiatives at issue in *Towers*, *Sizemore*, *Novick* and *Kane*. A public employer will have to provide all similarly situated public employees with the same terms, conditions and benefits of employment. The public employer will not be able to offer a non-union member public employee terms, conditions or benefits of employment that are less beneficial to the non-union member public employee than those negotiated for union member public employees in the same bargaining unit. This means that if the Initiative passes, a non-union member public employee will receive the benefits of a union-negotiated collective bargaining agreement without sharing in the costs of negotiating that agreement.

II. The Draft Ballot Title

A. The Caption

ORS 250.035(2)(a) provides that a ballot title must contain a "caption of not more than 15 words that reasonably identifies the subject matter of the state measure." The caption must "state or describe the proposed measure's subject matter accurately, and in terms that will not confuse or mislead potential petition signers and voters." *Lavey v. Kroger*, 350 Or 559, 563 (2011) (citations omitted; internal quotation marks omitted). The "subject matter" of an initiative is its "actual major effect." *Lavey*, 350 Or at 563 (citation omitted; internal quotation marks omitted). The "actual major effect" is the change or changes "the proposed measure would enact in the context of existing law." *Rasmussen v. Kroger*, 350 Or 281, 285 (2011). "The caption is the cornerstone for the other portions of the ballot title." *Greene v. Kulongoski*, 322 Or 169, 175 (1995). As the "headline," the caption "provides the context for the reader's consideration of the other information in the ballot title." *Greene*, 322 Or at 175.

The caption for the draft ballot title provides:

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

Ms. Conroy respectfully submits that the caption does not accurately describe the subject matter of the Initiative. First, the caption completely fails to explain to voters and potential petition signers that the Initiative would allow non-union member public employees to receive the benefits of union representation without paying costs. As was set forth above, a public employer cannot provide different wages, benefits and conditions of employment to union and non-union member public employees in the same bargaining unit. Accordingly, under the Initiative, a non-union member public employee within a bargaining unit would be entitled to the same wages and benefits as those provided to union members in a negotiated collective bargaining agreement. This is the same "something for nothing" scenario presented by the ballot titles at issue in *Towers*, *Sizemore*, *Novick*, and *Dale*.

As unequivocally stated in *Towers*, the ballot title for anti-worker initiatives that allow for non-union public employees to act as free riders "is controlled by prior decisions of this court." 354 Or at 130. Unfortunately, the draft ballot title for this Initiative is disconcertingly similar to the challenged, and Court rejected, ballot title for the initiative at issue in *Towers*. The post-referral modified ballot title for Initiative Petition 9 (2014) – the ballot title at issue in *Towers* – should have served as the starting (and ending) point for the ballot title here. *Towers* and its predecessor cases are controlling. The ballot title for the Initiative must address the free-rider issue, just as the Court held that the ballot titles at issue in *Towers* and the cases that preceded *Towers* were deficient for failing to adequately address the free-rider issue.

The phrase "[p]ublic employee unions not required to represent non-members" is inaccurate. Section 8 of the Initiative may have some impact on a union's obligation to represent a non-union member in an unfair labor practice dispute. However, the impact of Section 8 is unclear. Section 8 does not amend ORS 243.672, and does not address how a public employer or public employee union's disparate treatment of non-union member public employees under Section 8 can be reconciled under ORS 243.672. At most, Section 8 "changes" or "modifies" some representation obligations. But, the full reach of those changes is unclear, and will eventually be resolved by the Employment Relations Board or the courts. The caption ignores the practical effect of the Initiative, which is significantly more ambiguous that the language of Section 8. *See, e.g., Caruthers v. Myers*, 344 Or 596, 600 (2008) (Attorney General "may have to go beyond the words of a measure in order to give the voters accurate an neutral information about a proposed measure").

The phrase "[p]ublic employee unions not required to represent non-members" also is misleading. As was set forth above, under the Initiative, 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. However, the phrase "[p]ublic employee unions not required to represent non-members" would mislead voters and potential petition signers to believe that non-members would not gain from the negotiating activities of public employee unions. That phrase inaccurately implies that the Initiative does not create a free-rider problem, when it clearly does.

"Public union employee unions not required to represent non-members" also creates a misleading impression of current law. Under current law, public employee unions are not required to represent non-members that are not part of a bargaining unit for which the public employee union is the exclusive bargaining representative. In other words, if there is no recognized union for the bargaining unit, then the public employee union owes no representation obligations to the employees in that bargaining unit. The draft caption does not draw that distinction, and a voter or potential petition signer reading the draft caption easily could draw the erroneous conclusion that under current law, a public employee union must represent all non-members, regardless of whether an exclusive bargaining representative has been established for the bargaining unit.

"Public employee unions not required to represent non-members" also would leave voters with the erroneous impression that public employees have no choice *but* to be represented by public employee unions in all situations. However, that simply is not the law. There is no existing legal requirement "in any statutory scheme or contractual relationship, that *requires* any employee to 'accept' representation or services provided by a union." *Novick*, 333 Or at 25.

For the reasons set forth above, the caption must be modified.

B. The Results Statements

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

The results statements in the draft ballot title provide:

> "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.
>
> "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.

The results statements are flawed for the reasons set forth above and for the following additional reasons.

"[A]uthorizes public employee unions to decline representing non-members" is misleading. At most, section 8 modifies representation obligations in certain circumstances. However, as was set forth above, the Initiative does not amend all provisions of PECBA that require public employers and unions to treat union and non-union members consistently. The phrase also miscasts that under the Initiative non-union member free riders will receive terms and conditions of employment, including wages, that are as good as those negotiated for union members.

"Union membership requires annual renewal" is inaccurate, miscasts current law and does not belong in the result of yes statement. The Initiative provides only that: (1) public employees who choose not to renew membership cannot be required to make fair-share payments; and (2) a public employee union is the exclusive representative for public employees who choose to annually renew. However, the Initiative does not say that annual renewal is a condition of union membership for all purposes. The Initiative does not wholly alter what is required (or not required) to become or remain a public employee union member. The Initiative's impact on current law is, at best, vague.

"Union membership requires annual renewal" also creates an erroneous impression of current law. Under current law, no public employee can be required to become a union member. "Oregon *public* sector law does not authorize the negotiation of contracts that compel bargaining unit members to become union members." *Sizemore*, 342 Or at 586 (emphasis in original). *See also Dale*, 321 Or at 113 ("[w]ith respect to compulsory union membership, there is none"). Existing law does not compel union membership or authorize unions to negotiate contracts that compel union membership. Union members can opt of membership. However, the phrase "[u]nion membership requires annual renewal" would mislead voters into believing that union membership currently is compelled or can be required.

Finally, the phrase "[u]nion membership requires annual renewals" is inconsistent with prior cases from the Court. In *Dale*, the proposed initiative at issue – unlike the Initiative at issue here – explicitly required annual union membership renewals. 321 Or at 116, Appendix, § 10(d). The Court, recognizing that the renewal requirement was an insignificant effect of that initiative, modified and certified a title that did not mention the annual renewal in the caption or results statements. *Dale*, 321 Or at 115. In the light of the fact that the Initiative's impact on membership (and renewal) is much more ambiguous for this Initiative than it was for the initiative at issue in *Dale*, discussion of this tertiary effect in the result of yes statement is misplaced.

The result of no statement misstates current law. Current law provides that under a collective bargaining agreement, a non-member public employee may be required to share in representation costs that the union must provide to all bargaining unit members, not just representation costs for "non-members," as the result of no statement provides. Moreover, as was set forth above, the phrase "[m]embership renewals not required," also creates an erroneous impression of current law. No public employee can be forced to become a union member. The result of no statement for IP 9 (2014) – after referral to the Attorney General for modification – properly set forth current law, and Ms. Conroy respectfully submits that the Attorney General's decision to stray from that result of no statement is misplaced.

For the reasons set forth above, the results statements also must be revised.

C. The Summary

ORS 250.035(2)(d) requires that the ballot title contain a "concise and impartial statement of not more than 125 summarizing the state measure and its major effect." The summary is flawed for the reasons set forth above. The summary is flawed for the following additional reasons:

- The summary must describe the free-rider problem created by the Initiative.
- The phrase "[m]easure removes requirement that public employee unions represent non-union members" overstates what the Initiative actually does. As discussed above, the Initiative's impact on a union's representation obligation for non-members is unclear. The summary should so inform voters. *See, e.g., Wolf v. Myers*, 343 Or 494, 503 (2007) ("the Attorney General may state that the 'result' and the 'effect' of the measure is * * * unclear"). *See also* Initiative Petition No. 27 (2010), modified ballot title, after referral from the Oregon Supreme Court (summary providing: "[e]ffect on public sector unions' obligation to represent nonmembers is unclear").
- The phrase "union members must renew membership annually" also overstates the Initiative's effects and is inaccurate. An accurate description would inform voters that the Initiative "changes" or "modifies" membership renewal requirements.

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

Steven C. Berman

SCB:jjs
cc: client

June 2, 2015

By e-Mail to Irrlistnotifier.sos@state.or.us

The Honorable Jeanne Atkins
Secretary of State
Elections Division
255 Capital Street, N.E. Suite 501
Salem, Oregon 97310

Re: Initiative Petition 35 (2016)
Draft Ballot Title Comments

Dear Secretary Atkins:

I write as an elector in response to your Notice of May 18, 2015 inviting comments on the proposed ballot title for Initiative Petition 35 (2016); and seeking any additional comment "on whether the petition complies with the procedural constitutional requirement established in the Oregon Constitution for initiative petitions."

My comments are based on my some 40 years experience in collective bargaining organizing, representation, contact negotiations and enforcement, encompassing case handling and presentation in the public (several states), private and federal sectors in multiple industries and institutions, including 27 years under the Oregon Public Employee Collective Bargaining Act (PECBA).

I. Background

IP35 is one of the two initiative proposals submitted for the 2016 general election addressing public employee collective bargaining rights. Together they are the latest in long string of proposed initiatives spanning nearly 20 years that seek to restructure basic collective bargaining rights and representation for public for public employees under ORS 243.650.

A. *IP 35 Includes Two Distinct Subjects*

1. First Subject

The first subject of IP 35 is elimination of "fair share" provisions and related references from PECBA, including authority for public employers and labor organizations for entering and enforcing such agreements. This subject is reflected in IP 35s amendments deleting ORS 243.650(10), 243.650(18), 243.666(1) (in related part), and 243.672(1)(c) (in related part).

Generically known as "agency fee," "fair share" agreements are not automatic or universal. They are subject to negotiations between the labor organization and public employer. Though a mandatory subject of negotiations, resultant contracts can and do conclude without any non-member fee obligation. There are contracts covering Oregon public employees in force today that do not contain any fair share agreement. Even when fair share agreements are included,

PECBA currently provides an opportunity for represented employees to revoke authority of the labor organization to enter such an agreement.[1]

Unlike the second subject discussed below, this first subject is not related to rights of public employees to seek collective bargaining representation in ORS 243.662(1).[2]

As a subject of bargaining it relates only to matters that may be negotiated and included in collective bargaining agreements. It is one among the many topics over which bargaining may occur. It does not obligate either party to make or accept any particular proposal. Like any term or condition of employment, "fair share" agreements can come in a variety of forms, can include conditions for implementation, can expire, and can be terminated. "Fair share" provisions are a creature of the contact.[3]

However, they cannot take the form of a "closed shop," a condition unlawful since 1947 in the private sector, and unlawful from the beginning of PECBA, which requires union membership for employment. IP 35 comes close in the case of a newly hired public employee.

Neither can they take the form of a "union shop," denoting that all represented employees become and maintain membership in the labor organization. "Union shop,"[4] is unlawful under PECBA. *See, e.g. OSEA v. Oregon State University, 2 PECBR 958 (1977); affirmed, 30 OR App 757 (1977).* Yet, IP 35 would create such a condition, requiring membership for the right to representation and to engage in collective bargaining activities.

2. Second Subject

The second subject modifies the right of public employees for purposes of collective bargaining representation in a complex scheme designed essentially to eliminate sharing of representation costs.

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[1] ORS 243.650(10); OAR 115-030-0000

[2] "Public employees have the right 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 employments relations."

[3] "There are, in addition, certain purely contractual rights that expire along with the contract itself. These are rights or conditions that neither could nor would be binding without being included in the collective bargaining agreement. Such purely contractual rights include: * * * 3. Certain provisions concerning the rights of the exclusive representative. As an example, the right to receive fair share payments from nonmembers is entirely contractual . . . An employer may cease making such deductions when the collective bargaining agreement expires." *Oregon School Employees Association*, 6 PECBR 5036, 5047-5048 (1982). See also, *Department of Higher Education, University of Oregon v. Morton H. Shapiro, et al*, 4 PECBR 2276, 2285(1979). ("Finally, Senate Bill 474 does not make fair share payments automatic. All it does is eliminate the minimum requirement with respect to separate approval. Fair share is still negotiable, and does not become effective unless the parties agree to put a fair share provision in their contracts.)

[4] The common term for the generic "all union agreement."

Under current law, public employees' right "to form, join and participate . . ."[5] carries no requirement and puts no obligation on any public employee to exercise the right. Any public employee may and can refrain from exercising that right. They may, in fact, fairly act in opposition to others seeking to exercise that right. IP 35's insertion[6] into ORS 243.662(1) core statement of public employee collective bargaining rights, the phrase "freedom to choose whether or not" is superfluous and changes nothing from current law. Similarly superfluous is the insertion[7] into ORS 243.656(5) that the purpose of the statute is to "protect the right and freedom of public employees to choose whether or not to join a labor organization." As noted above, the exercise of the current law's right includes the option to refrain from exercising the right.

The exercise of the right under current law, and under IP 35, requires determination of an appropriate bargaining unit, a grouping of public employment positions, occupied by public employees, over which representation activities and bargaining obligations obtain. The unit may be voluntarily defined and agreed (as long as not contrary to law), or determined by the Employment Relations Board (ERB).[8] In the latter, the employees obtain representation by a majority vote through a representation election, or by a majority of employees having signed cards designating the union as their representative.[9] The grouping is defined by commonality among positions occupied by public employees based on the "community of interest" among the positions. These include commonalities such as wages, hours and working conditions, supervision, skills and benefits.[10]

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[5] See Note 2.
[6] IP 35 Section 5.
[7] IP 35 Section 4
[8] "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." ORS 243.650 Definitions for ORS 243.650 to 243.782.
[9] See OAR 115-25-0000 et. seq. (Public Employee Representation; Representation Petitions)
[10] See OAR 115-025-0050 (Appropriate Bargaining Unit(s))
"(1) A bargaining unit may consist of all of the employees of the employer, or any department, division, section or area, or any part or combination thereof, if found to be appropriate by the [Employment Relations] Board.
"(2) In considering whether a bargaining unit is appropriate, the [Employment Relations] Board shall consider such factors as community of interest (e.g., similarity of duties, skills, benefits, interchange or transfer of employees, promotional ladders, common supervisor, etc.), wages, hours and other working conditions of the employees involved, the history of collective bargaining and the desires of the employees. The [Employment Relations] Board may determine a unit to be an appropriate unit although some other unit might also be appropriate. However, the [Employment Relations] Board may not certify as appropriate, in any school district with 50 or more public employees, a bargaining unit that includes both academically licensed and unlicensed or nonacademically licensed employees. Academically licensed units may include but are not limited to teachers, nurses, counselors, therapists, psychologists, child development specialists and similar positions."

IP 35 does not alter the process or procedures for pursuing and securing the rights in ORS 243.662. It does not alter the place and role of bargaining units in collective bargaining representation. It does not alter the authority of the ERB to determine appropriate bargaining units, nor does it alter the analytical basis on which bargaining units are constructed and determined. It does not alter the obligation of the public employer to bargain with the certified or recognized representative over wages, hours and terms and conditions of employment and to embody those agreements in a written contract. It still requires the labor organization/union to bargain in good faith on behalf of all the employees in positions included in the bargaining unit. It continues as an unfair labor practice, discrimination "in regard to hiring, tenure or any terms or condition of employment for the purpose of encouraging or discouraging membership in an employee organization."[11] Membership or non-membership is not a factor in determining a bargaining unit. Nor, can membership/non-membership be used to differentiate such things as compensation, insurance, benefits, scheduling, assignments, or application of any terms and conditions of employment without engaging in unfair labor practices.

Ambiguities abound. Exercise of the core right to representation, still requires an initial inclusion in a bargaining unit and representation by a labor organization/union. Only after that is established will individuals be able to choose, under the provisions of IP 35, whether they are those "who annually indicate in writing that they choose to join and be represented by a labor organization" for purpose of collective bargaining.[12] IP 35's attempts to redefine the public employee representation rights by inserting the phrase "who have chosen to join a labor organization" and variants into ORS 243.650(3), (4), (8); 243.656(5), 243.662(1), and 243.666(1) and (2) is subsequent to initial activities.

For already represented employees, ambiguities, confusion and uncertainty pile up. IP 35 fails to define when the "annual" mandatory designation tolls.. Clearly, it cannot be before there is a unit determination and actual certification or recognition. Does the annual event toll on the certification or recognition anniversary? The effective date of an initial agreement? The anniversary of the initial agreement? The expiration date of an agreement? The employee's hiring anniversary? Must it be the same date for all employees desiring to exercise the opt-in/opt-out right? Is it subject to negotiations? If so, the employer is involved in the determination as to when and under what circumstances an individual can exercise the right, which under current law constitutes and unfair labor practice. Meanwhile, even though and employee may choose not to join and be represented, the employee will carry the same contract terms with them because it will remain an unfair labor practice for an employer to discriminate in terms conditions relating to membership. The public employee will gain nor more or less terms and conditions of employment by exercising the annual option. As a practical matter any one or more teacher, nurse, social worker, fire fighter, prison guard, custodian, school secretary, state trooper, community college instructor and so on, up to everyone in an entire bargaining unit could self-exclude in one annual occurrence and join in the next with every combination in between.

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[11] ORS 243.672(1)(c).
[12] IP 35 Section 6, amending ORS 243.666(1) limiting the definition of those whom an exclusive representative represents.

IP 35 incorporates an unlawful requirement of mandatory union membership *and* designation of representation to exercise collective bargaining rights. It removes the current right for non-members to independently adjust grievances with the employer unless the public employee is a member.

At first glance, th4e language of IP 35 seems straightforward. Implementing it includes a variety of contradictions and ambiguities, susceptible to multiple interpretations. It moves the clarity of current law on application of collective bargaining agreements to a cloudy future. It creates uncertainty for public employer and collective bargaining representative contract administration, exposing both to complaints of unfair labor practices.

In sum, IP 35 is a Trojan Horse. Subsections (1) and (2)[13] of Section 1, are already a matter of settled law. Subsection (3)[14] of Section 1, is simply a retooled effort to eliminate "fair share." Subsection (4)[15] of Section 1, is window dressing to cover the core objective of eliminating "fair share." Employees exercising the right to join and be represented, regardless of their annual choice, will continue enjoy the terms and conditions of the contract without the obligation to share in the cost of negotiations to secure the agreement.

The draft ballot title is woefully inaccurate in its description of IP 35. It must be completely and substantially revised.

II. The Draft Title

A. *Caption*

The draft caption is:

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

This caption is grossly flawed. It states a condition already prohibited under current law. It mischaracterizes the plain text of IP 35. It is wrong as a matter of law. The misstatement would be misleading to petition signers and voters.

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[13] IP 35, Section 1(1) "A person shall have the individual freedom of choice in 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."
[14] IP 35, Section 1(3) "A person shall not be required to make compulsory payments to a labor organization as a condition of public employment."
[15] IP 35, Section 1(4) "A labor organization shall not be required to collectively bargain for or provide representation services to public employees who choose not to join a labor organization."

A ballot title, as provided by ORS 250.055(2)(a), must contain a caption of up to 15 words that reasonably identifies the subject matter of the state measure. The caption must be framed so as not to "confuse or mislead potential petition signers or voters." *Mabon v. Myers*, 332 Or 633 (2001). In doing so it should neither overstate, nor understate the scope of the legal changes the initiative would enact. And, "the Attorney General may have to go beyond the words of the measure in order to give the voters accurate and neutral information about a proposed measure." *Caruthers v. Myers*, 344 Or 596, 601 (2008).

B. *Results Statements*

Results statements require a simple, understandable description of the result of the measure if approved or rejected. The purpose of each is integral to clarity for petition signers and voters. The "Yes" result statement tells petition signers and voters the result of enactment of the measure. See *Novick v. Myers*, 337 Or 568, 574 (2004). The "No" result tells voters the *status quo* retained by rejection of the measure; and to avoid misleading voters about the effect of their vote, the description must reflect the subject matter of the proposal. See *Nesbitt v. Myers*, 335 Or 424, 431 (2003).

1. Result of "Yes" Vote

The draft "Yes" Result Statement reads:

> "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."

This result statement is deeply flawed. It seriously misstates that public employee unions can "decline representing non-members." IP 35 does not grant that right to public employee unions. Rather, IP 35 confers on public employees a right to annually designate union membership and representation for collective bargaining. Under current law, these two items are separate, unrelated issues. IP 35 joins them into a single question public employees annually must answer. neither. IP 35 puts the representation question to the individual public employees, not the union.

2. Result of "No" Vote

The draft "No" Result Statement reads:

> "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.

This statement errs from not accurately stating current law. As discussed above, PECBA and the results of cases thereunder clearly show that union membership ***cannot*** lawfully be a

condition of public employee representation. Neither is membership renewal, a condition not existing under current law.

C. Summary Statement

A ballot title is required under ORS 250.035(2)(d) to contain a statement of up to 125 words that accurately summarizes the measure and its *major effects*. The draft Summary statement reads:

> "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 nonmembers 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 union 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."

This draft summary is flawed for all of the reasons noted above, especially in that IP 35 gives to all public employees, not just union members, the annual option to designate member *and* representation.

III. Multiple Subjects

As noted in the comments above, I believe IP 35 includes two distinct subjects: (1) a matter that is included among those subjects over which bargaining is required between a public employer and he exclusive representative of its public employees; and (2) the right of public employees to collective bargaining representations, and condition added thereto. Neither is subject to or a condition of the other, and they are not related. Each stands by itself without reliance of the others. These two subjects are not connected.

The Oregon Constitution, Article IV(1)(2)(d),[16] provides: "An initiative petition shall include the full text of the *proposed law* or amendment to the Constitution. A *proposed law* or amendment to the Constitution shall embrace *one subject only* and matters properly connected therewith." (*emphasis added*)

IP 35 does not comply with the requirements in the Oregon Constitution for an initiative petition. IP 35 should be found to violate the single subject requirement and not be allowed on the ballot.

[16] See *Armatta v. Kitzhaber,* 327 Or. 250, 959 P.2d 49 (1998) for analysis of single subject requirement.

IV. Conclusion

If the Attorney General continues to defend this ballot title, it seems that an elector should consider seeking attorney fees pursuant to ORS 20.105 for the petition required to obtain a determination that IP 35 invalid because it contains more than one proposed law in violation of the Oregon Constitution; or alternatively, for the petition required to obtain a valid title from the Supreme Court.

Thank you for the opportunity to submit these comments and for your careful consideration of them. I would appreciate receipt of a copy of the certified ballot title as soon as it becomes available.

Richard H. Schwarz
3411 NW Vaughn Street
Portland, Oregon 97210
(503) 248-9229

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

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.

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

MJL:aft/6581384

Enclosure

Jill Gibson
10260 SW Greenburg Rd, Suite 1180
Portland, OR 97223

Lee Vasche
lee@sgco.us
By email only

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.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on July 29, 2015, I directed the original Respondent's Answering Memorandum to Petitions to Review Ballot Title Re: Initiative Petition No. 35 to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Jill Odell Gibson, chief petitioner; and upon Margaret S. Olney, attorney for petitioners Bethanne Darby and Hanna Vaandering; and upon Eric C. Winters, petitioner; using the court's electronic filing system.

/s/ Matthew J. Lysne

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

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

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 378-4402