IN THE SUPREME COURT OF THE STATE OF OREGON

HANNA VAANDERING and TRENT LUTZ, AND HEATHER CONROY Petitioners, v. ELLEN F. ROSENBLUM, Attorney General, State of Oregon, Respondent.	)	Supreme Court Case No. 63820 PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL Initiative Petition 2016-069

Initiative Petition 2016-069
Ballot Title Certified December 31, 2015

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PETITION

Pursuant to ORS 250.085(2) and ORAP 11.30, petitioners ask the court to review the ballot title (Ex. A, p.1) for Initiative Petition 2016-069 (Ex. A, pp. 2-10), certified by the Attorney General on December 31, 2015 (Ex. B). The court should find that all parts of the ballot title fail to meet the statutory standards and refer the matter back to the Attorney General.

PETITIONERS' INTEREST

Petitioners are Oregon electors who seek review of this ballot title in their individual capacities. Ms. Vaandering is the President of the Oregon Education Association and Mr. Lutz is the Acting Executive Director of Public Affairs. Ms. Conroy is the Executive Director of SEIU, Local 503. Petitioners filed comments on the draft ballot title (Ex. C, pp. 1-16, Vaandering/Lutz comments; Ex. C, pp. 17-22, Conroy comments) and therefore have standing under ORS 250.085(2) to seek review of this certified ballot title.

ARGUMENTS AND AUTHORITIES

I. Overview of IP 69

IP 69 is an anti-union proposal that would, as Chief Petitioners themselves acknowledge, "fundamentally change" public sector collective bargaining in Oregon by amending the Public Employee Collective Bargaining Act ("PECBA"). ORS 243.650 *et. seq*. Section 3(1). There are at least five "actual major effects" which must be adequately identified in the ballot title: (1) public employers must establish different wages, benefits and other terms of employment for union and non-union members within a bargaining unit (Section 9(4) and (5)); (2) public employers cannot base non-union member employment terms on the union contract but rather, individual consideration of

specified criteria (Sections 3 and 9); (3) because of both the general and specific weakening of the PECBA's anti-discrimination provisions, public employers may intentionally encourage or discourage union membership by offering different employment terms to union and non-union members (Section 9); (4) non-union members cannot be required to make any payments to the union, thus prohibiting fair share agreements (Section 4(1)); and (5) non-union bargaining unit employees cannot "benefit" (undefined) from union representation without sharing representation costs (Section 4(2)).[1]

II. The Ballot Title

Not surprisingly, the Attorney General had a difficult time describing IP 69 within the word limits. However, by referencing only certain changes, the ballot title is impermissibly underinclusive. Portions are also inaccurate.

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 "cornerstone for the other portions of the ballot title" and cannot overstate or understate the scope of the legal changes the initiative would enact. *Kain/Waller v. Myers*, 337 Or 36, 93 P3d 62 (2004). 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)." *Lavey v. Kroger*, 350 Or 559, 563, 258 P3d 1194 (2011) (citation omitted). To identify a measure's "actual major effect," the court considers the "changes that the proposed measure would enact in the context of existing law." *Rasmussen v.*

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[1] Petitioners refer the court to their detailed analysis of the changes made by IP 69 set forth in their comments, and incorporate them by reference. Ex. C, pp. 2 – 9; Ex. C, pp. 17-19.

Kroger, 350 Or 281, 285, 253 P3d 1031 (2011). This means that the Attorney General "may have to go beyond the words of a measure in order to give the voters accurate and neutral information about a proposed measure." *Caruthers v. Myers*, 344 Or 596, 600, 189 P3d 1 (2008).

Here, the Attorney General certified the following caption:

> Public employer cannot compensate non-union employee based on union contract; limits union representation of non-members

There are three fatal flaws. Most fundamentally this caption only references two of the five major changes made by IP 69. Indeed, the Attorney General acknowledges this problem ("we acknowledge that there are several "actual major effects" of IP 62 [sic]"), but states that word limits prevent referring to them all. Ex. B, p. 3. However, the court has made clear that it is impermissible for the Attorney General to pick and choose among subjects simply because of word limits. *Greenberg v. Myers*, 340 Or. 65, 69, 127 P.3d 1192 (2006) ("What the Attorney General cannot do is select and identify in a caption only one out of multiple subjects and thus understate the scope of the proposed measure's subject matter.")

In addition, the clause describing the proposal's requirement that "wages, benefits and other terms of employment" for non-union employees be different than those established in the union contract is itself fatally underinclusive. This is because it only refers to "compensation" – a term which encompasses wages and benefits, but not non-monetary employment terms – thus inaccurately suggesting that the proposal only affects financial terms. *See, e.g. Nesbitt v. Myers,* 328 Or 400, 404, 978 P2d 378 (1999)

(finding underinclusive caption that only mentioned "taxes" when proposal also affected fees).

The phrase also understates the actual effect of this requirement. Under Section 9(4), a public employer cannot "base" employment terms for independent employees on a union contract and *vice versa.* This necessarily means that those terms will be different.[2] The certified caption describes only one side of this prohibition, and thereby understates this change.

The following alternatives[3] demonstrate that it is possible to capture the breadth of the changes made by IP 69 while also describing the key subject:

> Requires different employment terms for union, non-union public employees; modifies bargaining, representation, cost-sharing, anti-discrimination laws
>
> Public employers must provide different compensation, other employment terms to union, non-union members; other changes

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[2] The Attorney General defended her formulation by stating that the proposal only prohibits *basing* employment terms for non-union employees on a union contract, but does not actually *prohibit* identical terms. Ex. B., p. 4. This is a distinction without a difference. A public employer could not credibly defend setting wages, benefits and other employment terms for non-union employees which are identical to those set forth in a collective bargaining agreement without running afoul of Section 9(4). In that event, either the union contract is based on the criteria by which individual employee's salary is set or the reverse. Stated differently, the only way to demonstrate that wages, benefits and employment terms are *not* "based on" the collective bargaining agreement (and *vice versa*) is to provide different employment terms to union and non-union employees. Voters must be informed of this effect in order to not understate the proposal's reach.

[3] All petitioners challenged the Attorney General's draft caption as underinclusive, with only Petitioners Vaandering and Lutz offering an alternative. *See,* Ex. C., p. 10; Ex. D, p. 4; Ex. E. p. 12. That alternative meets the statutory standards because the phrase "modifies union obligations" is sufficiently broad to signal the significant changes to the PECBA made by IP 69. But to the extent that alternative is also deemed underinclusive, Petitioners Conroy may offer these alternatives, consistent with her comments.

B. Results Statements

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 approved or rejected. The purpose of the "yes" vote result statement 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). In contrast, the "no" vote result statement must explain to voters "the state of affairs" that will exist if this 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). *See also*, *Nesbitt v. Myers*, 335 Or 424, 431, 71 P3d 530 (2003)(review of modified ballot title).

The Attorney General certified the following results statements:

> **Result of "Yes" Vote":** "Yes vote prohibits public employer compensating nonunion employee based on union contract; public employee unions need not represent nonmembers; limits charging representation fees to non-members.
>
> **Result of "No" Vote:** "No" vote retains current law: unions represent all public employees in organized bargaining unit; member, non-member compensation based on union contract; mandatory non-member fees permissible.

These statements carry forward the problems identified in the caption. First, even with the additional words, the first clause of the "yes" vote result statement fails to tell voters that the proposal requires *different* compensation and *other employment terms* for union and non-union members. Instead, the statement only references compensation, and then describes only one side of the reciprocal prohibitions on how public employers

establish wages, benefits and other employment terms for union employees (in the collective bargaining agreement) and non-union employees. Section 9(4).

Second, the clause "public employee unions need not represent nonmembers" overstates the effect of the proposal. Even if unions are no longer *required* to represent non-members under IP 69, Sections 3 and 4(2), they will continue to do so as a practical matter when they advocate for employment conditions that will necessarily benefit all covered employees. Setting and enforcing standards regarding schedule and workload are good examples. *See, e.g.* Portland Public Schools and Portland Association of Teachers dispute and arbitrations regarding high school workloads and schedules. *http://www.oregonlive.com/education/index.ssf/2015/05/portland_public_schools_to_pay.html.* This means that all that can be said is that the proposal *modifies* or *changes* union representation obligations. *See, Caruthers v. Myers,* 344 Or 596, 602, 189 P3d 1 (2008).[4]

Third, the statement fails to alert voters to the changes made to the PECBA's anti-discrimination laws. The Attorney General did not even address this argument in her letter, nor is it mentioned anywhere in the certified ballot title, which suggests that she views these changed as minor. But that is incorrect. The amendments to ORS 243.672 (setting out unfair labor practices) made in Section 9 are significant and run counter to well-accepted anti-discrimination doctrine. Currently, a public employer cannot treat employees differently because of union membership or activity. *See, e.g. PAT v. Mult.*

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[4] The last clause, "limits charging representation fees to non-members," is technically accurate and an improvement over the draft, which stated, "employees must pay union only if benefit from representation." That clause remains, however, in the summary. Petitioners will discuss why it is inaccurate on page 9 of this petition.

Sch. Dist. 1, 171 Or App 616, 16 P3d 1189. They can under IP 69, even if motivated by a desire to discourage union membership. This change must be identified for voters.

Regarding the "no" statement, the focus on compensation is impermissibly narrow. In addition, the phrase "mandatory non-member fees permissible" is misleading because it fails to explain that fees can only be charged for the representation costs the union is legally obligated to provide. *See, e.g.,* certified "no" vote result statements for IP 36 and 36 (2016), IP 9 (2014). Finally, and most fundamentally, the "no" statement fails to tell voters that it is currently unlawful to provide different employment terms based on union membership, the law most relevant to the proposal's key subject matter. This concept was included in the draft statement and then removed. This was error.

The following alternatives would meet statutory standards:

> **RESULT OF "YES" VOTE:** "Yes" vote requires public employers to provide different wages, benefits, other employment terms to union, non-union members; modifies union bargaining, representation, cost-sharing, anti-discrimination laws.
>
> **RESULT OF "NO" VOTE:** "No" vote retains current law prohibiting different employment terms based on union membership; allowing agreements requiring all bargaining unit members to share required representation costs.

C. Summary

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

The Attorney General certified the following summary:

> **Summary:** Currently, public employees in a bargaining unit may be represented by a union. Union membership cannot be required as condition of public employment. Union represents (in negotiations, contract enforcement) all public employees in bargaining unit. Collective bargaining agreements can require non-members to share the costs of the legally-required union representation. Compensation differences/conduct to encourage/discourage union membership prohibited. Measure prevents public employer from establishing non-union employee compensation and employment terms by union contract, allows compensation differences. Measure removes requirement that public employee unions represent non-members; prohibits requiring non-members to pay costs of representation unless they benefit from representation; union members must renew membership annually. Measure applies to new, renewed, or extended contracts entered into after the effective date of measure. Other provisions.

While the certified summary is better than the draft summary, it still contains inaccurate and misleading statements and, more generally, fails to convey how fundamentally the proposal changes public sector collective bargaining. Specifically:

(1) The first sentence is inaccurate when it states that employees in a bargaining unit "may" be represented by a union. An employee cannot be "in a bargaining unit" unless the union has been recognized or certified as exclusive representative (ORS 243.683), at which time the union has a duty to represent all covered employees; employees have no choice.

(2) The description in the fifth sentence of current anti-discrimination provisions ("compensation differences/conduct to encourage/discourage union membership prohibited") is too narrow and therefore misleading. Under current law, it is unlawful for a public employer to treat employees differently based on union membership or other protected activity, regardless of intent. ORS 243.672(1)(a) and (c); *Wy'East Educ. Ass'n*

v. Or. Trail Distr. No. 46, 244 Or App 194, 207, 260 P3d 626 (2011). The statement in the summary errs by suggesting otherwise.

(c) The description of the key provision continues to focus on compensation, without making clear that the proposal would require public employers to offer different wages, benefits and other terms of employment based on union membership.[5]

(d) The description of IP 69's changes to the duty of representation and the ability of unions to collect fair share fees is inaccurate and misleading when it states "[m]easure removes requirement that public employee unions represent non-members; prohibits requiring non-members to pay costs of representation unless they benefit from representation." Section 4(1) of IP 69 expressly prohibits public sector unions from collecting any money from non-members. Section 4(2) then prohibits non-paying bargaining unit employees from "benefiting" from labor representation. But that section has no independent effect; there is no mechanism for collecting such payments since Section 4(1) prohibits requiring any payments from non-members. The initiative also gives absolutely no guidance on what "benefiting" means.[6] This means that it is improper to simply quote the words of the measure as the certified summary does, as if they have any true or clear meaning.

In her explanatory letter, the Attorney General rejected this argument, stating that "'fair share' payments are mandatory once any benefits are conferred on a non-member."

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[5] The summary does reference "employment terms" once, but otherwise only refers to "compensation differences."

[6] As discussed on page 6, it would be virtually impossible for non-members to not "benefit" from union representation, particularly on non-economic provisions that necessarily apply to all similarly situated employees. Thus, if the term is used, it must be put in quotations, and followed by "undefined."

Ex. B, p. 6. This is incorrect. Receiving the benefits of representation does not convert a non-member to a member, and under Section 4(1), unions cannot require payments from non-members.[7] Because of this ambiguity, the summary must tell voters that the effect of the ban on representing non-members is unclear. *Caruthers v. Myers*, 344 Or 596, 602, 189 P3d 1 (2008) (certifying ballot title summary stating that effect of proposal purporting to eliminate a union's representation obligations was "unclear."); *see also,* ballot titles for IP 35 and 36 (2016), also certified by this court.

(3) The summary fails to describe the fundamental changes to existing union-discrimination provisions, including the fact that those changes now allow discrimination – i.e., the setting of employment terms for the purpose of encouraging or discouraging union membership.

Petitioners refer the court to the alternative summary proposed in the comments to see how these deficiencies can be corrected. Ex. C, p. 15-16.

DATED January 15, 2016.

Respectfully Submitted,

BENNETT, HARTMAN, MORRIS & KAPLAN, LLP

s/Margaret S. Olney
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of Attorneys for Petitioner

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[7] If IP 69 were to pass, unions that negotiate or enforce provisions that necessarily benefit all bargaining unit employees might seek compensation from non-members through some judicial or administrative mechanism. But what that might look like is highly speculative. The point is that in describing this aspect of the proposal, the ballot title cannot simply repeat the words of the measure where their effect is either meaningless or ambiguous.

Certified by Attorney General on December 31, 2015.
/s/ Denise G. Fjordbeck
Assistant Attorney General

BALLOT TITLE

Public employer cannot compensate non-union employee based on union contract; limits union representation of non-members

Result of "Yes" Vote: "Yes" vote prohibits public employer compensating non-union employee based on union contract; public employee unions need not represent non-members; limits charging representation fees to non-members.

Result of "No" Vote: "No" vote retains current law: unions represent all public employees in organized bargaining unit; member, non-member compensation based on union contract; mandatory non-member fees permissible.

Summary: Currently, public employees in a bargaining unit may be represented by a union. Union membership cannot be required as condition of public employment. Union represents (in negotiations, contract enforcement) all public employees in bargaining unit. Collective bargaining agreements can require non-members to share the costs of the legally-required union representation. Compensation differences/conduct to encourage/discourage union membership prohibited. Measure prevents public employer from establishing non-union employee compensation and employment terms by union contract, allows compensation differences. Measure removes requirement that public employee unions represent non-members; prohibits requiring non-members to pay costs of representation unless they benefit from representation; union members must renew membership annually. Measure applies to new, renewed, or extended contracts entered into after the effective date of measure. Other provisions.

The Public Employee Choice Act

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

SECTION 1. The people of Oregon find that:

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

SECTION 2. Sections 3, 4, 7, 10, 11, and 12 of this 2016 Act are added to and made part of ORS 243.650 to 243.782.

SECTION 3.
(1) This 2016 Act fundamentally changes public employee collective bargaining so that independent employees may not be required to make payments to a labor organization against their will and labor organizations may not be required to provide services to independent employees. Independent employees may not benefit from labor organization bargaining, representation, or services without sharing representation costs.
(2) Independent employees may not be included in appropriate bargaining units. Independent employees shall be treated as employees who work in a workplace that is not represented by an exclusive representative. Independent employees shall have their wages, benefits, and other terms of employment based on their individual education, experience, training, skills, and performance. Any such term of employment that is based on individual education, experience, training, skills, and performance is valid, nondiscriminatory, and may not constitute an unfair labor practice. Employers may not base wages, benefits, and other employment terms for independent employees on a collective bargaining agreement or other agreement which the independent employee did not sign.
(3) Union employees shall have their wages, benefits, and other terms of employment set according to the applicable collective bargaining agreement negotiated between their exclusive representative and employer. Any term of employment for a union employee that is based on a collective bargaining agreement is valid, nondiscriminatory, and may not constitute an unfair labor practice.
(4) A comparison of the employment terms and conditions for union employees with those of independent employees may not form the basis of an unfair labor practice or discrimination claim.

SECTION 4.

(1) Compulsory payments to labor organizations by public employees who choose to not join a labor organization shall be prohibited.

(2) Public employees who choose to not join or pay a labor organization may not benefit from labor organization bargaining, representation, or services without sharing representation costs.

SECTION 5. ORS 243.650 is amended to read:

ORS 243.650. As used in ORS 243.650 to 243.782, unless the context requires otherwise:

(1) "Appropriate bargaining unit" means the unit designated by the Employment Relations Board or voluntarily recognized by the public employer to be appropriate for collective bargaining. **An appropriate bargaining unit may only include employees who join a labor organization, known as "union employees." An appropriate bargaining unit shall exclude employees who choose not to join or pay a labor organization, known as "independent employees." Labor organizations are not required to represent and bargain on behalf of independent employees.** [*However, a*] An appropriate bargaining unit may not include both academically licensed and unlicensed or nonacademically licensed school employees. Academically licensed units may include but are not limited to teachers, nurses, counselors, therapists, psychologists, child development specialists and similar positions. This limitation does not apply to any bargaining unit certified or recognized prior to June 6, 1995, or to any school district with fewer than 50 employees.

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

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

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

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

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

bargaining.

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

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

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

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

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

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

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

(8) "Exclusive representative" means the labor organization that, as a result of certification by the board or recognition by the employer, has the right to be the collective bargaining agent of all employees **who have chosen to join a labor organization** [*in an appropriate bargaining unit*]. **Exclusive representatives are not required to represent independent employees.**

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

[*(10) "Fair-share agreement" means an agreement between the public employer and the recognized or certified bargaining representative of public employees whereby employees who are not members of the employee organization are required to make an in-lieu-of-dues payment to an employee organization except as provided in ORS 243.666. Upon the filing with the board of a petition by 30 percent or more of the employees in an appropriate bargaining unit covered by such union security agreement declaring they desire that the agreement be rescinded, the board shall take a secret ballot of the employees in the unit and certify the results thereof to the recognized or certified bargaining representative and to the public employer. Unless a majority*

of the votes cast in an election favor the union security agreement, the board shall certify deauthorization of the agreement. A petition for deauthorization of a union security agreement must be filed not more than 90 calendar days after the collective bargaining agreement is executed. Only one such election may be conducted in any appropriate bargaining unit during the term of a collective bargaining agreement between a public employer and the recognized or certified bargaining representative.]

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

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

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

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

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

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

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

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

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

(18) [*(20)*] "Public employer" means the State of Oregon, and the following political subdivisions: Cities, counties, community colleges, school districts, special districts, mass transit districts, metropolitan service districts, public service corporations or municipal corporations and public and quasi-public corporations.

(19) [*(21)*] "Public employer representative" includes any individual or individuals

specifically designated by the public employer to act in its interests in all matters dealing with employee representation, collective bargaining and related issues.

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

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

(a) A nurse, charge nurse or nurse holding a similar position if that position has not traditionally been classified as supervisory; or

(b) A firefighter prohibited from striking by ORS 243.736 who assigns, transfers or directs the work of other employees but does not have the authority to hire, discharge or impose economic discipline on those employees.

(22) [*(24)*] "Unfair labor practice" means the commission of an act designated an unfair labor practice in ORS 243.672. **A comparison of the employment terms for union employees with the employment terms for independent employees, and any effects of those employment terms, may not form the basis of an unfair labor practice.**

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

SECTION 6. ORS 243.656 is amended to read:

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

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

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

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

conditions, and by establishing greater equality of bargaining power between public employers and public employees;

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

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

SECTION 7. Public employees who choose to not join a labor organization or to not annually renew membership in such an organization shall not be required to pay dues or payments-in-lieu-of-dues to a labor organization, another organization, or third party as a condition of employment.

SECTION 8. ORS 243.666 is amended to read:

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

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

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

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

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

SECTION 9. ORS 243.672 is amended to read:

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

(a) Interfere with, restrain or coerce employees **who engage in collective bargaining** *[in or because of the exercise of rights guaranteed in ORS 243.662]*. **Nothing in this section prohibits employers from establishing employment terms pursuant to subsection (5). A comparison of employment terms for union employees to the employment terms for independent employees, and any effects of such terms, may not form the basis of an unfair labor practice.**

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

(c) Discriminate in regard to hiring, tenure or any terms or condition of employment for the purpose of encouraging or discouraging membership in an employee organization. [*Nothing in this section is intended to prohibit the entering into of a fair-share agreement between a public employer and the exclusive bargaining representative of its employees. If a "fair-share" agreement has been agreed to by the public employer and exclusive representative, nothing prohibits the deduction of the payment-in-lieu-of-dues from the salaries or wages of the employees.*] **Nothing in this section prohibits employers from establishing employment terms pursuant to subsection (5). A comparison of employment terms for union employees to the employment terms for independent employees, and any effects of such terms, may not form the basis of an unfair labor practice.**

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

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

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

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

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

(i) Violate ORS 243.670(2).

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

(k) Base wages, benefits, and other employment terms for an independent employee on any collective bargaining agreement or other agreement which the independent employee did not sign.

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

(a) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under ORS 243.650 to 243.782. **This subsection shall not require a labor organization to represent, provide services to, or bargain on behalf of independent employees.**

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

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

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

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

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

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

(h) For any labor organization to enter into a contract which requires public employees who choose to not join a labor organization to make compulsory payments to a labor organization.

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

(4) Employers are prohibited from basing wages, benefits, and other employment terms for independent employees on a collective bargaining agreement or other agreement which the independent employee did not sign. Employers are prohibited from basing wages, benefits, and other employment terms for union employees on the employment terms of independent employees.

(5) Employers shall base wages, benefits, and other employment terms for an independent employee on the employee's individual education, experience, training, skills, and performance. Any such term of employment that is based on individual education, experience, training, skills, and performance is valid, nondiscriminatory, and may not constitute an unfair labor practice. Employers shall base wages, benefits, and other employment terms for union employees on the applicable collective bargaining agreement negotiated between the exclusive representative and employer. Any term of employment

for a union employee that is based on a collective bargaining agreement is valid, nondiscriminatory, and may not constitute an unfair labor practice. A comparison of the employment terms for union employees with the employment terms for independent employees, and any effects of those employment terms, may not form the basis of an unfair labor practice.

SECTION 10.

(1) A labor organization is not required to collectively bargain for or provide any type of service to public employees who choose not to 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 11. Notwithstanding any other provision of law, public employees who choose not to join a labor organization may not benefit from labor organization bargaining, representation, or services without sharing representation costs.

SECTION 12. This 2016 Act shall be interpreted to effectuate the dual purpose of prohibiting compulsory payments by independent employees to labor organizations and prohibiting the receipt of labor organization services and benefits by independent employees without sharing representation costs.

SECTION 13. The Public Employee Choice Act shall not apply to any collective bargaining agreement or contract between an employer and a labor organization entered into before the effective date of the Act but shall apply to a renewal, extension, or modification of any kind of a contract or agreement or to a new contract or agreement entered into after the effective date the Act.

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DEPARTMENT OF JUSTICE
APPELLATE DIVISION

December 31, 2015

Jim Williams
Director, Elections Division
Office of the Secretary of State
255 Capitol St. NE, Ste. 501
Salem, OR 97310

Re: Proposed Initiative Petition — Public Employer Cannot Compensate Non-Union Employee Based on Union Contract; Limits Union Representation of Non-Members
DOJ File #BT-69-15; Elections Division #2016-069

Dear Mr. Williams:

We received comments on the Attorney General's draft ballot title for Initiative Petition 69 (2016) (BT-69-15) from chief petitioner Jill Gibson, as well as from Hanna Vaandering and Trent Lutz (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;
Ms. Vaandering and Mr. Lutz object to all parts of the ballot title;
Ms. 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.

Procedural constitutional requirements

Commenter Richard Schwarz raises the issue of whether the proposed measure does not comply with constitutional procedural requirements, because it: (1) unlawfully delegates legislative authority; and, (2) would, if adopted, discriminate on the basis of religion. Those issues are beyond the scope of the ballot title drafting process. *See* OAR 1650-14-0028 (providing for separate review process by Secretary of State to determine whether measure complies with constitutional procedural requirements for proposed initiative measures). Accordingly, we do not address them here.

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 employers cannot establish non-union employee compensation based on union contract; resulting compensation differences allowed**

We address the comments and objections below.

1. Comments from Ms. Gibson

Ms. Gibson objects that the caption is deficient because it fails to identify what she contends is the measure's "actual major effect": "to simultaneously relieve both unions and non-members of obligations that currently exist" in the Public Employee Collective Bargaining Act (PECBA). (Gibson Letter, 4-6). She argues that the caption is underinclusive because it focuses on employee compensation rather than the fact that, under the measure, "non-members are not required to pay union dues and unions are not required to represent non-members." (*Id.* at 5). In the alternative, if the certified caption "focuses on employee compensation," she argues that it should also notify voters that non-members are given a new right to compensation based on their individual merit, and that to do otherwise is misleading because it would imply that non-members would be left with no protection or criteria regarding their compensation. (*Id.* at 4).

2. Comments from Ms. Vaandering and Mr. Lutz

Ms. Vaandering and Mr. Lutz contend that the draft caption is deficient because it is

> both under-inclusive and inaccurate; it fails to convey the breadth of the changes made by the proposal, inaccurately suggests that the initiative only addresses "compensation," and finally errs by suggesting that the proposal only *allows* different treatment of union and non-union employees when, in fact, IP 69 *requires* different treatment and allows discrimination.

(Olney Letter, 10). They agree that the word "compensation" encompasses both "wages" and "benefits," but argue that the caption must also inform voters that section 9(4) of the measure also requires separate negotiations as to "other employment terms." (*Id.* at 7-8, 10). They further argue that the word "establish" is inadequate to inform voters that IP 69 requires public employers to "actually negotiate with 'independent employees' – an activity that may be quite burdensome." (*Id.* at 10). Finally, they assert that the draft caption fails to "capture how fundamentally IP 69 changes public sector collective bargaining." (*Id.* at 10-11).

3. Comments from Ms. Conroy

Ms. Conroy objects to the draft caption in several respects. First, like Commenters Vaandering and Lutz, she writes that the caption fails to alert voters that IP 69 "*requires* public employers to treat union and non-union members differently as to the terms and conditions of employment, including wages, benefits, and all other 'employment terms.'" (Berman Letter, 4). She also argues that the caption is underinclusive because it understates the "full sweep" of the measure, that is, it eliminates "fair-share" agreements, the duty of fair representation to non-union employees and payments-in-lieu-of-dues. (*Id.*). She argues that the caption must reflect the two actual major effects of the measure, which she contends, are to

> [First], radically revise[] the structure and working of PECBA, to ensure that: non-union employees have drastically restricted rights and protections regarding terms and conditions of employment imposed by public employers; and non-union member public employees cannot benefit from union-negotiated collective bargaining agreements. Second, the Initiative *mandates* that public employers treat union and non-union employees differently as to wages, benefits and other terms and conditions of employment.

(Berman Letter, 4 (emphasis in original).

4. Comments from Mr. Schwarz

Mr. Schwarz objects that the draft caption is deficient because it fails to capture the effects of IP 69, which "redesigns the entire collective bargaining arrangement for public employees and public employers." (Schwarz Letter, 12). He also contends that the caption fails to "reflect the separation of public employees into two classes, the limitation on collective bargaining representation, the requirement for membership to engage and maintain collective bargaining representation, or new restrictions on pubic employers in determining and setting wages, etc." (*Id.*). He also argues that the caption fails to capture IP 69's "primary objective to remove fair share and the 'free rider'" effect. (*Id.*).

5. Our response to the comments

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

As an initial matter, we acknowledge that there are several "actual major effects" of IP 62. The measure prohibits employers from setting non-union compensation and terms based on the union contract, and provides that differences in compensation and employment terms are not an unfair labor practice, thereby abrogating *Portland Ass'n Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 623, 16 P3d 1189 (2000) (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.]"). The measure also provides that public employee unions are no longer required to provide representation of non-union members, and also eliminates "fair-share" agreements. But given the strict word limits for the caption, we are prevented from addressing all four of those effects in the caption. However, all four effects are addressed in the result statements and summary.

With respect to Ms. Vaandering's, Mr. Lutz's, and Ms. Conroy's objections that IP 69 "requires" public employers to treat union and non-union members differently as to the terms and conditions of employment, we disagree that the measure has that effect. Section 9(4) section does not *prohibit* wages, benefits, and other employment terms for independent employees that are identical to those in a collective bargaining agreement, but only prohibits *basing* wages, benefits, and other employment terms for independent employees on a collective bargaining agreement or other agreement which the independent employee did not sign.

With respect to the objection that the word "establish" is inadequate, we disagree that the word "negotiate" is more suitable, because nothing in the measure requires a public employee union to engage in individualized negotiation with non-union members. However, we have modified the caption to avoid that issue. We disagree that the word "compensation" is inadequate; due to word limitations in the caption, the fact that the measure also applies to "other employment terms" is discussed in the summary.

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

Public employer cannot compensate non-union employee based on union contract; limits union representation of non-members

B. The "yes" and "no" vote result statements

We next consider the draft "yes" and "no" vote result statements. 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 prevents public employer basing non-union employee compensation on union contract; resulting compensation differences allowed; employees must pay union only if benefit from representation.

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 law allowing contracts that specify all bargaining unit public employees' compensation, require non-member payments; continues prohibition against compensation encouraging/discouraging union membership.

We address the comments and objections below.

1. Comments from Ms. Gibson

Ms. Gibson reiterates her objections to the caption, above, and argues that the draft "yes" vote result statement should be revised to notify voters that the measure prohibits compulsory representation and compulsory payment of union dues. (Gibson Letter, 7). She also argues that the draft "no" vote result statement does not adequately communicate the current state of the law regarding compulsory representation and compulsory payment of union dues, and incorrectly implies that the measure changes current law, under which collective bargaining agreement specifies compensation for "all bargaining unit employees." (*Id.*). She contends that the measure instead excludes non-members *from* bargaining units. (*Id.*).

2. Comments from Ms. Vaandering and Mr. Lutz

Ms. Vaandering and Mr. Lutz reiterate their objections to the caption. (Olnely Letter, 11). They also argue that the phrase "employees must pay union only if benefit from representation" in the "Yes" result statement is inaccurate and misleading because, they argue, that provision "has no real effect, and even if it did, does not actually change current law." (*Id.* at 12). They further argue that section 4(1) prohibits fair share agreements, so "there is no mechanism to collect money from non-union employees, even if they do benefit from representation." (*Id.*). They argue that it is "extremely likely that non-union members will, in fact, benefit from union representation." (*Id.*).

Ms. Vaandering and Mr. Lutz also raise multiple objections to the draft "no" vote result statement. First, they reiterate their arguments as to the caption, above. (*Id.* at 13). Next, they argue that voters "need to understand that it is currently unlawful for a public employer to provide different employment terms based on union membership" and that "current law allows agreements that require all bargaining unit members to share cost of legally required representation." (*Id.*) Finally, they argue that current law does not require proof of *intent* to encourage or discourage union membership, but prohibits terms if the "natural and probable consequence" of the term is to encourage or discourage union membership. (*Id.* at 14).

3. Comments from Ms. Conroy

Ms. Conroy reiterates her objections to the caption, above, and contends that they apply to the draft "yes" and "no" vote result statements. (Berman Letter, 5). Like commenters Ms. Vaandering and Mr. Lutz, she argues that the phrase "employees must pay union only if benefit from representation" in the "Yes" result statement is inaccurate and misleading because the measure prohibits dues or fair share payments and does not provide a mechanism for payment. (*Id.*).

She further contends that the draft "no" vote result statement misstates current law, which prohibits public employers and public employee unions from treating union and non-union members differently, and should inform voters that fair-share and payments-in-lieu-of-dues are allowed so that non-union employees can receive the benefits of union-negotiated contracts and representation. Finally, she argues that the phrase "continues prohibition against compensation encouraging/discouraging union membership" is inaccurate because current law prohibits differential *treatment*, not simply differential *compensation*. (*Id.* at 5-6).

4. Comments from Mr. Schwarz

Mr. Schwarz argues that the draft "yes" and "no" vote results statement are deficient because they are too narrowly tailored and fail to encompass the full breadth of current law and the changes imposed by IP 69 respecting collective bargaining representation. (Schwarz Letter, 12-13).

5. Our response to the comments

After consideration of the comments concerning the draft result statements, we agree that the result statements should be revised. With respect to Ms. Gibson's argument that the "no" result statement misstates current law: a public employee union represents all public employees in a bargaining unit whether they are union members or not. Thus, the phrase "'No' vote retains law allowing contracts that specify all bargaining unit public employees' compensation, require non-member payments" is accurate. However, we have modified the "no" result statement for clarity and readability.

With respect to the objection to the phrase "employees must pay union only if benefit from representation" in the "Yes" result statement, we disagree that it is inaccurate and misleading. Though section 4(1) of the measure prohibits compulsory payments to non-members, section 4(2) further provides that non-members cannot benefit without sharing representations costs; section 11 makes the same provision. Therefore, if a non-member does, in fact, "benefit" from union representation, they must pay for such services. Thus, "fair share" payments are mandatory once any benefits are conferred on a non-member. However, we have rephrased the "yes" result statement to clarify that the measure "limits" charging union fees to non-members. Furthermore, the draft "no" statement correctly informs voters that non-members must make payments to share the cost of representation. Because we have modified the "no" result statement, we need not address the objection to the phrase "continues prohibition against compensation encouraging/discouraging union membership."

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

> **Result of "Yes" Vote:** "Yes" vote prohibits public employer compensating non-union employee based on union contract; public employee unions need not represent non-members; limits charging representation fees to non-members.

> **Result of "No" Vote:** "No" vote retains current law: unions represent all public employees in organized bargaining unit; member, non-member compensation based on union contract; mandatory non-member fees permissible.

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: Currently, public employees in a bargaining unit may be represented by a union. Union membership cannot be required as condition of public employment. Union represents (in negotiations, contract enforcement) all public employees in bargaining unit. Collective bargaining agreements can require represented nonmembers to share the costs of the legally-required union representation. Compensation differences to encourage/discourage union membership are prohibited. Measure prevents public employer from establishing non-union employee compensation, employment terms by union contract, allows compensation differences. Measure removes requirement that public employee unions represent non-members; prohibits requiring non-members to pay costs of representation unless they benefit from 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 reiterates her objection to the caption and result statements, above. (Gibson Letter, 8). She also writes that the word "represented" in the fourth sentence is redundant to "representation," and that that sentence should be moved forward in the summary. (*Id.*).

2. Comments from Ms. Vaandering and Mr. Lutz

Ms. Vaandering and Mr. Lutz carry forward their objections to the caption and result statements. (Olney Letter, 15). They also contend that the first sentence is inaccurate because, under current law, a union *must* represent all members of a bargaining unit. They also argue that the summary should inform voters that it is unclear whether a non-member will be required to make payments to the union if they "benefit" from representation. (*Id.*).

3. Comments from Ms. Conroy

Ms. Conroy reiterates her objections to the caption and result statements, set out above. (Berman Letter, 6). She also writes that the phrase "prohibits requiring non-members to pay costs of representation unless they benefit from representation" is inaccurate because the measure eliminates fair share and payments-in-lieu-of-dues in their entirety. (*Id.*).

4. Comments from Mr. Schwarz

Mr. Schwarz objects that the summary fails to capture that "the changes are intended to eliminate fair share and make membership in the labor organization the central feature in exercising collective bargaining rights." (Schwarz Letter, 14).

5. Conclusion

After consideration of the comments concerning the summary, we disagree that, for the same reasons described above, the summary should be substantially revised. However, we agree that the word "represented" in the fourth sentence is redundant. We also agree that the sentence "Compensation differences to encourage/discourage union membership are prohibited" should

be revised to clarify that current law prohibits differential treatment, not just differential compensation, to union and non-union public employees. We disagree that the first sentence is inaccurate- public employees in a bargaining unit are not required to be represented by a union, but may choose to do so.

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

Summary: Currently, public employees in a bargaining unit may be represented by a union. Union membership cannot be required as condition of public employment. Union represents (in negotiations, contract enforcement) all public employees in bargaining unit. Collective bargaining agreements can require non-members to share the costs of the legally-required union representation. Compensation differences/conduct to encourage/discourage union membership prohibited. Measure prevents public employer from establishing non-union employee compensation and employment terms by union contract, allows compensation differences. Measure removes requirement that public employee unions represent non-members; prohibits requiring non-members to pay costs of representation unless they benefit from representation; union members must renew membership annually. Measure applies to new, renewed, or extended contracts entered into after the effective date of measure. Other provisions.

E. Conclusion

We certify the attached ballot title.

Sincerely,

/s/ Denise G. Fjordbeck

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December 15, 2015

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

The Honorable Jeanne Atkins
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Salem, Oregon 97310-0722

Re. Initiative Petition 69 (2016) - Draft Ballot Title Comments
Our File No. 18600-33

Dear Secretary Atkins:

This office represents Hanna Vaandering and Trent Lutz, Oregon electors who wish to comment on IP 69 (2015). Ms. Vaandering is the President of the Oregon Education Association and Mr. Lutz is the Acting Executive Director of Public Affairs.

1. INTRODUCTION

IP 69 is the latest anti-union proposal which has been filed by Chief Petitioner, Jill Gibson. Like other anti-union proposals, IP 69 is couched in the cloak of protecting "employee free choice" but is actually designed to weaken public sector collective bargaining and the ability of unions to represents the interests of public employees. Rather than create a level playing field for all bargaining unit members – regardless of whether they chose to be a union member – it requires public employers to treat employees differently exactly because of that choice. This mandated and state sanctioned discrimination based on union membership fundamentally changes Oregon's collective bargaining laws and must be plainly identified in the ballot title.[1]

[1] IP 69 is likely unconstitutional as well, because it requires different treatment of employees based on their exercise of constitutionally protected rights of association under the First Amendment. Ironically, it is exactly those First Amendment rights that anti-union activists invoke in arguing that fair

Below, commenters will first describe relevant current law and then describe how the proposal changes that law. They will then turn to the specific concerns with 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 complex 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 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. 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 whose positions are within the bargaining unit remain bargaining unit members even if they choose not to join. These employees are often referred to as "covered employees" and are typically required to pay dues or "payments-in-lieu-of-dues," commonly known as "fair share" fees. *See,* ORS 243.650(10) and (18).

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

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share agreements are unconstitutional. *Friedrichs v. California Teachers Assoc., cert. granted,* 135 S. Ct. 2833 (2015).

"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 for both negotiations and contract enforcement and exists independently of any desire by a bargaining unit member to receive representation.

C. 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 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.*

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

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 allows non-members to refuse to pay for expenses that are not germane to or supportive of the negotiations and contract enforcement. *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). Expenditures that relate to representation are deemed "chargeable" and all other expenditures are deemed "non-chargeable" and therefore cannot be collected over an employee's objection. *Carlson v. AFSCME*, 73 Or App 755, 761, 700 P2d 260 (1985); *Ebersole v. Mollala Education Ass'n/OEA/NEA*, 15 PECBR 160, 179 (1994). The Employment Relations Board is charged with determining whether a challenged expenditure is "chargeable" or "nonchargeable."

D. Union Membership Status

Public employee unions, as independent organizations, have the right to define membership standards and requirements. *See, e.g. Burkhart v. OPEU*, 14 PECBR 150 (1992) (upholding validity of internal policies authorizing member discipline). For example, they can limit membership to those employees who ask to join and who pay full dues, i.e., pay for both representation activities and so-called "political and ideological" activities of the union. Unions can then limit the availability of certain benefits to members, so long as those benefits do not flow from the collective bargaining agreement itself. Common benefits include group discounts for insurance, financial services and educational programs, as well as extra liability insurance. Finally, the union can provide that only members get to vote in any governance election, including electing leaders or ratifying contracts.

E. 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. .

F. Non-Bargaining Unit Employee Employment Terms

As a general rule, public employees who are not bargaining unit members have no right to demand that their employment terms be set on specific criteria or the ability to challenge their employment terms, except with their feet. That is, if an employee does not like the offered terms, then he or she does not have to take or stay in the job. There are limited exceptions for some state employees under ORS 240.235. And, of course, different pay cannot be based on a protected class such as gender or race.

3. CHANGES MADE BY IP 69

1. Overview.

As even Chief Petitioner acknowledges, IP 69 fundamentally changes Oregon's collective bargaining laws. Section 3(1) reads:

> "This 2016 Act fundamentally changes public employee collective bargaining so that independent employees may not be required to make payments to a labor organization against their will and labor organizations may not be required to provide services to independent employees. Independent employees may not benefit from labor organization bargaining, representation, or services without sharing representation costs."

In order to achieve these goals, proponent has crafted a bizarre, impractical and probably unconstitutional scheme that both *requires* public employers to provide different employment terms to similarly situated employees based upon union membership status and *allows* outright discrimination to encourage or discourage union membership.

To understand IP 69, it is helpful to look at IP 35 and 36 (2016), two proposals that also purported to eliminate fair share as well as a union's duty to represent non-members. According to proponents, these proposals eliminated the free rider problem. *See*, Jill Gibson *Petitions to Review* for IP 35 and 36. But as the Attorney General correctly noted, even under those initiatives, all covered employees, including nonmembers, would still benefit from representation – i.e., receive the same wages, benefits and other terms and conditions of employment as union members – because of the PECBA's non-discrimination provisions. ORS 243.672(1)(a) and (c). That is, under current law, a public employer is prohibited from treating employees differently based on membership status. Therefore, the Attorney General certified the following caption for both IP 35 and 36: "Non-union public employees may benefit from union bargaining without sharing representation costs; modifies representation obligations." Chief Petitioner challenged those titles to the Oregon Supreme Court arguing that both proposals eliminated the free rider problems. The court rejected the argument without comment, and certified the titles as written.

IP 69 is Chief Petitioner's attempt to avoid that conclusion. Thus, it expressly provides that a "comparison of employment terms for union employees with the employment terms for independent employees, and any effects of those employment terms, may not form the basis of an unfair labor practice." Sections 6 and 9. The problem with this approach, however, is that instead of prohibiting discrimination based on membership status, IP 69 now requires it. It thus turns collective bargaining and basic principles of fairness on their head.

2. IP 69 Creates Two Categories of Employees

IP 69 establishes two categories of employees, "union employees" and "independent employees." "Union employees" are those who join a labor union; "independent employees are those who chose not to join or pay a labor organization." Sections 3 and 5 (amending the definition of "appropriate bargaining unit" and "public employee" in ORS 243.650(1). Under IP 62, an appropriate bargaining unit cannot include "independent employees."[3] Notably,

[3] By limiting "appropriate bargaining units" to "union members," proponents demonstrate a basic misunderstanding of labor law. "Appropriate bargaining unit" describes the positions that fall within the bargaining unit for purposes of a representation election or employer recognition. ORS 243.682. Once a union becomes the exclusive representative, then the scope of the "appropriate bargaining unit" determines *which* employees are covered by the contract and therefore have the right to choose whether or not to join the union. Simply put, employees can only choose not to join the union if they are within the "appropriate bargaining unit." Therefore, eliminating non-members from the bargaining unit makes no sense and will impact other aspects of the PECBA, including representation matters.

there is nothing in the measure to prevent a "union employee" from becoming an "independent employee" at any time by withdrawing from the union and/or stopping payment, as contemplated by Section 3 and 4.

3. IP 69 Prohibits Agreements Requiring All Bargaining Unit Employees to Pay for Representation.

Section 4(1) prohibits agreements to require all bargaining unit members to pay dues or payments-in-lieu-of-dues to the union. Section 4(2) then states that employees choosing not to pay the union any money "may not benefit from labor organization bargaining, representation, or services without sharing representation costs." *See also*, Section 11. As discussed in more detail below, subsection 2 has no real effect. This is because subsection (1) bans fair share agreements altogether, regardless of whether non-union employees receive any benefit from union representation. That is, the union can only collect money from employees who chose to join the union, it cannot force an employee to "join" the union in order to pay for representation that he or she "benefits" from. In addition, as a practical matter, it is impossible for "independent" employees in the same position as "union" employees not to benefit from the employment terms negotiated by the union.

4. IP 69 Requires Public Employers to Bargain Different Employment Terms for Similarly Situated "Union Employees" and "Independent Employees."

Under IP 69, "Independent employees shall have their wages, benefits and other terms of employment based on their individual education, experience, training, skills and performance." Sections 3(2), 9(5). Thus, IP 69 creates a right that does not otherwise exist for public employees to bargain with their employers and have their employment terms set based on specified criteria. But IP 69 goes even further to require differential treatment based on union membership. Section 9(4) provides:

Similarly, as written, the change to the definition of "appropriate bargaining unit" removes ERB's authority under ORS 243.682 to determine the "appropriate bargaining unit" and instead gives it to the labor organization. This is because only employees who "join the union" are included in the unit, but the union retains the authority to determine membership. Again, this approach is fundamentally inconsistent with the current structure of the PECBR.

Finally, this change, combined with the changes to ORS 243.666 set forth in Section 8, mean that individuals who have *bona fide* religious objections to joining the union, but who otherwise want to receive the benefits of union representation, have no ability to do so. That is because there are only two options – union employee and independent employee. Any employee choosing not to join the union becomes an "independent employee" whose employment terms *must be* different than those negotiated by the union.

> "Employers are prohibited from basing wages, benefits and other employment terms for independent employees on a collective bargaining agreement or other agreement which the independent employee did not sign. Employers are prohibited from basing wages, benefits, and other employment terms for union employees on the employment terms of independent employees."

What this means is that a public employer *must* negotiate different employment terms for union and non-union members, even if they are otherwise similarly situated. For example, assume that we have two first year bus drivers with no prior experience and the same education. One chooses to join the union; the other does not. Under the collective bargaining agreement, a union employee is paid $14/hour and is on probation for six months, at which time he gains "just cause" job protections and his wage is increased to $15/hour. The non-union employee's hourly rate will have to be either more or less than the contractual rate of $14/hour, and any job protections (if offered) would have to be different than what is set out in the contract. Otherwise, the non-union employee's employment terms would be based on – i.e., track – the collective bargaining agreement, and he would "benefit" from union representation which is expressly prohibited.

The reach – and impracticality -- of IP 69's prohibition on basing independent employee employment terms on a collective bargaining agreement is staggering. Unions advocate for and negotiate provisions regarding a wide range of "employment terms," from workload limits to procedures and standards governing evaluations, transfers, and scheduling. *See, e.g.*, Portland Association of Teachers/Portland Public School Collective Bargaining Agreement, Article 5, addressing work year, workday and workload issues in detail. http://www.pps.k12.or.us/schools/gray/files/bmadison/PAT_Contract_2013-16.pdf It would be virtually impossible for a public employer to set different employment terms in these non-financial areas, yet that is what IP 69 purports to require. Again, an example demonstrates the problem. Assume that a new teacher is hired who chooses not to join the union. At the time of hiring, the student contract year is 182 days, and teachers are entitled to one hour of preparation time per day. As part of the next bargain, the union agrees to shorten the contract year to 180 days, in exchange for lengthening the work day and increasing daily preparation time. If the employer changes the independent employee's hours and work year to be consistent with the new contract, then it will have committed an unfair labor practice under IP 62, Section 9 (creating new ULP under ORS 243.672(1)(k)). That is, but for the change in the union contract, the independent employee's employment terms would not have changed. The ballot title must signal this burden on public employers.

5. IP 69 Allows Public Employers to Discriminate Against Union Members

Section 9 of the proposed measure makes sweeping and substantial changes to the statute governing unfair labor practices, effectively gutting any protection unions and their members might have against anti-union activities by public employers. First, the amendment to ORS 243.672(1)(a) only protects "employees who engage in collective bargaining." By definition, "collective bargaining" is between the public employer and the exclusive bargaining representative, so it is unclear who would be covered. Presumably, local leaders and members of the bargaining team might be, but that is a very small subset of public employees. Second, it is not clear what activity would be protected or what employer conduct would be deemed unlawful, given the elimination of the phrase "in or because the exercise of rights guaranteed in ORS 243.662." Accordingly, even if the only change to ORS 243.672(1)(a) was the elimination of the "in or because of" protected rights language and replacement with "employees who engage in collective bargaining," IP 69 significantly weakens the PECBA's protections against anti-union discrimination.

Of course, IP 69 goes even further. In addition to the change discussed above, it provides that an unfair labor practice complaint cannot be based on a "comparison of employment terms for union employees with the employment terms for independent employees, and any effects of those employment terms." Section 9(5); *see also*, Section 5 (amending the definition of "unfair labor practice" under ORS 243.650); Section 9 (amending the description of unfair labor practices under ORS 243.672(1)(a) and(c)). This gives public employers the green light to offer more favorable compensation and other employment terms to independent employees, even with the express goal of discouraging union membership. Thus, it could provide the "independent" bus driver mentioned above $15/hour to star to discourage union membership. Or it could provide "independent" teachers with additional planning time. To be sure, many public employers may prefer working with the union than negotiating separate agreements with each independent employee, but the point is that IP 69 both requires different employment terms based on union membership, and permits discrimination that would currently be unlawful. The draft ballot title recognizes this impact; the certified ballot tile must as well.

4. DRAFT BALLOT TITLE

A. Caption

ORS 250.035(2)(a) provides that a ballot title contain "a caption of not more than 15 words that reasonably identifies the subject matter of the state measure." The caption is the "headline" or "cornerstone for the other portions of the ballot title" and in order to comply with the statute, it must identify the proposal's subject matter in terms that will not "confuse or mislead potential petition signers and voters." *Kain/Waller v. Myers*, 337 Or 36, 40, 93 P3d 62

(2004) (quoting *Greene v. Kulongoski*, 322 Or 169, 174–75, 903 P2d 366 (1995)). As the court 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 Attorney General issued the following draft ballot title:

> Public employers cannot establish non-union employee compensation based on union contract; resulting compensation differences allowed.

This caption must be substantially revised. It is both under-inclusive and inaccurate; it fails to convey the breadth of the changes made by the proposal, inaccurately suggests that the initiative only addresses "compensation," and finally errs by suggesting that the proposal only *allows* different treatment of union and non-union employees when, in fact, IP 69 *requires* different treatment and allows discrimination. We will discuss these concerns in more detail below.

The first problem is that the caption focuses on only one aspect of the proposal – the setting of compensation. The Attorney General is correct to specifically reference compensation because that is a bedrock employment term, and is inclusive of "wages" and "benefits," the two employment terms specifically referenced by IP 69. However, the caption must also let voters know that the requirement for separate negotiations applies to other employment terms as well. As discussed above, those employment terms can also be extremely meaningful and, under IP 69, must be different than what is in the union contract.

Second, it is important that voters understand that the proposal requires the public employer to actually negotiate with "independent employees" – an activity that may be quite burdensome. "Establish" does not adequately describe this distinct obligation.

Third, because it is unlawful for a public employer to base compensation or any other employment term for independent employees on a collective bargaining agreement and *vice versa*, IP 69 *requires* the employer to negotiate different compensation and employment terms for union and non-union members. The draft caption's reference to "allows" is insufficient.

Finally, the caption fails to capture how fundamentally IP 69 changes public sector collective bargaining. The duty of an exclusive bargaining representative to bargain terms and conditions of employment for all covered employees is core to the PECBA. So too is the

prohibition against treating covered employees differently based on their membership status. As even the authors recognize, IP 69 fundamentally changes the collective bargaining laws. While it is impossible to reference all of those changes in the caption, it is important that it alert voters to those changes.

We propose the following alternative:

> Public employers must negotiate different compensation, employment terms for union, non-union members; modifies union obligations

This alternative plainly describes the measure's key effect. It alerts voters to the impact of IP 69 on public employers -- they will now be required to negotiate different compensation and employment terms for union and non-union bargaining unit employees. The phrase "modifies union obligations" signals to voters that the proposal changes the union's bargaining and representation obligations. Additional detail can be provided later in the ballot title.

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" prevents public employer basing non-union employee compensation on union contract; resulting compensation differences allowed; employees must pay union only if benefit from representation

This draft statement suffers from the same shortcomings as the caption. It fails to convey the breadth of the changes made by the proposal. Even with the extra word space, it inaccurately describes the measure as only being about compensation. It also inaccurately states that the proposal *allows* differential treatment when it actually *requires* differential treatment.

The last phrase, "employees must pay union only if benefit from representation" is inaccurate and misleading for a number of reasons. As discussed above, this provision has no

real effect, and even if it did, does not actually change current law. That is, currently, only bargaining unit employees who benefit from representation can be required to pay for that representation through dues or payments-in-lieu-of-dues. Thus, there is nothing new about a provision that says that employees who benefit from representation must pay for that representation. It does not belong in the "result" statement.

It is also inaccurate to state that employees who benefit from representation must pay for it. Section 4(1) prohibits "fair share" agreements to require covered employees to pay the union any money; only employees who chose to become members pay for the representation that they receive. In other words, there is no mechanism to collect money from non-union employees, even if they do benefit from representation. It is also extremely likely that non-union members will, in fact, benefit from union representation, particularly around non-financial employment terms, which makes the clause inaccurate. For example, if an employee's workload is based on provisions set out in the collective bargaining agreement, that independent employee will be benefiting from the union's advocacy. This is not hypothetical. An extremely common area of dispute for educators relates to student contact time and other measures of workload, such as number of classes taught. *See, e.g. Three Rivers Educ. Ass'n v. Three Rivers Sch. Dist.*, 254 Or App 570, 294 P3d 547 (2013) and cases cited therein challenging increases in student contact time); *Hillsboro Education Association v. Hillsboro School District, 20 PECBR 124 (2002), aff'd without opinion,* 192 Or App 62 (2004); (District committed ULP by increasing the number of classes taught); *PAT v. PPS High School Workload Dispute* (arbitration finding change in schedule and student loads violated contract, and ordering change in schedule) http://www.oregonlive.com/education/index.ssf/2015/05/portland_public_schools_to_pay.html. Since it is virtually impossible to change student schedules based on whether one is an independent employee versus union employee, independent employees will benefit from union advocacy. The point is that the ballot title should not reference this self-serving and unenforceable provision.

To correct these problems, we propose the following, which builds on our proposed caption:

> **RESULT OF "YES" VOTE:** "Yes" vote requires public employers to negotiate different compensation, employment terms for union, non-union members; modifies union bargaining, representation, payment for representation, anti-discrimination laws.

This alternative identifies all of the major changes made by the proposal. It starts with the key effect of the proposal – to require differential treatment of union and non-union members. It follows by alerting voters to the scope of changes to the PECBA made by IP 69, by listing the affected areas – bargaining, representation, payment of representation costs, and the

PECBA's non-discrimination provisions which are effectively gutted. Notably, this alternative does not seek to characterize the *effect* of IP 69 as discriminatory (although, of course, that is an effect), but rather signal to voters that the proposal alters existing protections against membership- based discrimination under ORS 243.672(1)(a) and (c). *Compare, Mabon v. Keisling*, 317 Or 405, 417, 856 P2d 1023 (discouraging use of the word "discriminate" if possible) and *Ascher v. Kulongoski*, 322 Or 516, 909 P2d 1216 (1996) (approving summary using "discrimination" to describe proposal); *see also*, IP 52 (2014) certified caption ("Religious Belief" Exceptions To Anti-Discrimination Laws For Refusing Services, Other, For Same Sex Ceremonies, "Arrangements"). Finally, the court itself – as well as the Employment Relations Board – has described the PECBA has prohibits "union discrimination," including "membership-based discrimination." *See, Sizemore v. Myers/Terhune*, 342 Or 578, 587 n3, 157 P3d 188 (2007) (noting that Oregon law prohibits "membership-based discrimination").

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 law allowing contracts that specify all bargaining unit public employees' compensation, require non-member payments; continues prohibition against compensation encouraging/discouraging union membership.

Like the other portions of the ballot title, this statement focuses too narrowly on one aspect of the law (compensation), is inaccurate, and otherwise fails to provide voters with the information that is most relevant to the *status quo*. Specifically, voters need to understand that it is currently unlawful for a public employer to provide different employment terms based on union membership. Regarding representation and fair share, voters need to understand that current law allows agreements that require all bargaining unit members to share cost of legally required representation.

In addition, the last clause does not accurately describe current law surrounding anti-union discrimination. As drafted, the "no" result statement makes it sound like current law

only prohibits paying different wages *with the intent* to encourage or discourage union membership. However, under well-established law, it is not necessary to prove intent. The payment of different employment terms based on union status would be unlawful "if the "natural and probable consequence" of the different treatment is to encourage or discourage union membership. *ONA v. OHSU*, 19 PECBR 590, 594 (2002).

We propose the following:

> **RESULT OF "NO" VOTE:** "No" vote retains current law prohibiting different employment terms based on union membership; allowing agreements requiring all bargaining unit members to share required representation costs.

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).

The draft summary reads:

> **Summary:** Currently, public employees in a bargaining unit may be represented by a union. Union membership cannot be required as condition of public employment. Union represents (in negotiations, contract enforcement) all public employees in bargaining unit. Collective bargaining agreements can require represented non-members to share the costs of the legally-required union representation. Compensation differences to encourage/discourage union membership are prohibited. Measure prevent public employer from establishing non-union employee compensation, employment terms by union contract, allows compensation differences. Measure removes requirement that public employee unions represent non-members; prohibits requiring non-members to pay costs of representation unless they benefit from 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 summary must be substantially revised. The description of current law is inaccurate and incomplete. The description of how the measure works fails to accurately convey the key points or the proposal's major effects. More specifically:

- The first sentence is inaccurate when it states that public employees in a bargaining unit *may* be represented by a union. Under current law, the union *must* represent all members of the bargaining unit (a point more accurately reflected in the draft summary's third sentence).
- The description of the PECBA's union discrimination provisions in the fifth sentence is inaccurate and misleading, because it suggests that *intent* is a key element. Rather, as the Attorney General recognized during the ballot title review process for IP 35 and 36, it is currently unlawful for a public employer to offer different employment terms to union and non-union bargaining unit members, regardless of intent.
- The description in the sixth sentence of how the proposal works continues to improperly focus only on compensation and therefore understates the reach of the changes.
- The description of the ban on fair share payments is inaccurate, to the extent that it suggests that a non-member public employee who benefits from union representation can be required to pay for that representation. Under Section 4(1), fair share agreements are completely prohibited. Section 4(2), which purports to prohibit non-paying bargaining unit employees from "benefiting" from labor representation has no independent effect. Because of this ambiguity, the summary must tell voters that the effect of the ban on representing non-members is unclear. *Caruthers v. Myers*, 344 Or 596, 602, 189 P3d 1 (2008) (certifying ballot title summary for measure that purported to modify the union's representation obligations that stated that the effect was unclear.)
- As in the rest of the ballot title, the summary erroneously states that the proposal merely *allows* public employer to provide different employment terms to non-union members. To the contrary, IP 9 *requires* such differential treatment.
- The summary fails to describe the fundamental changes to existing union-discrimination provisions, including the fact that those changes now allow discrimination -- i.e., the setting of employment terms for the purpose of encouraging or discouraging union membership.

The following alternative more accurately and completely describes how IP 69 works and the breadth of its impact. Word space for additional concepts was found through editorial changes.

> **Summary:** Currently, public employee union elected or recognized as exclusive bargaining representative must represent (in negotiations and contract enforcement) all employees in bargaining unit, regardless of union membership; public

employer cannot provide different employment terms to non-union members; employees can be required through collective bargaining agreement to share costs of legally required union representation. Measure requires public employers to negotiate individually with non-union employees based on specified criteria; must provide different wages, benefits and other employment terms to non-union employees than those provided in union contract; limits scope of unfair labor practice complaints for union interference, discrimination; allows different compensation, other employment terms that discourage, encourage union membership; prohibits agreements requiring union payments by non-members; removes requirement that union represent all bargaining unit members (effect unclear).

5. CONCLUSION

The Attorney General has the challenging job of drafting a ballot title that fairly and completely describes a citizen initiative within a very short timeframe. Some proposals are easier to summarize, others are more difficult. IP 69 is one of the more difficult ones. In order to avoid any claim that non-union members benefit from representation for free, Chief Petitioner has crafted an internally inconsistent (and unconstitutional) proposal that fundamentally changes public sector bargaining in Oregon. It requires differential treatment of union and non-union employees and allows overt union discrimination. The draft ballot title appropriately identifies the impact of these changes on the PECBA's anti-discrimination provisions, but fails to adequately describe the new mandate or the scope of other changes. Accordingly, we respectfully request that the ballot title be revised as proposed in these comments.

Sincerely,

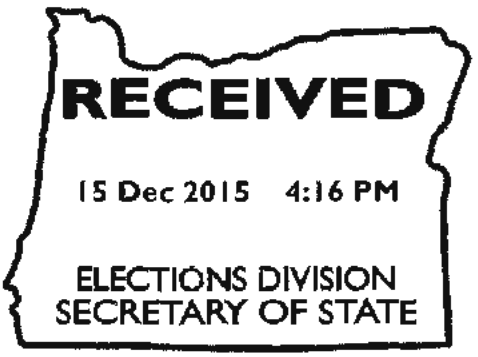
Bennett, Hartman, Morris & Kaplan, LLP

MSO:kaj
cc: Clients

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

Steven C. Berman
sberman@stollberne.com

December 15, 2015



VIA EMAIL

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

Re: Initiative Petition No. 69 for the General Election of November 8, 2016

Dear Secretary Atkins:

I represent Heather Conroy regarding the ballot title for Initiative Petition No. 69 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 public notice, dated December 1, 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). Ms. Conroy recognizes the burden placed on the Attorney General by the Chief Petitioner of the Initiative. In an over-zealous attempt to construct an Initiative that avoids the "free-rider" effect, the Chief Petitioner has drafted an Initiative that is convoluted, unwieldy, internally contradictory and, in all probability, unconstitutional. Ms. Conroy appreciates that Attorney General's good faith efforts to draft a ballot title that accurately describes the Chief Petitioner's bizarre and ill-conceived proposal. The Attorney General's task for an Initiative such as this one is unenviable. Ms. Conroy provides these comments to assist the Attorney General in working through this poorly drafted to provide a ballot title that meets the statutory requirements.

I. An Overview of Initiative Petition No. 69

The Initiative amends ORS 243.650 to ORS 243.782, the Public Employee Collective Bargaining Act ("PECBA"). The Initiative contains 13 sections.

Section 1 is a policy statement. Section 2 provides that certain sections of the Initiative are incorporated in PECBA.

Section 3 states that it is the purpose of the Initiative to "fundamentally change[]" public employee collective bargaining, so that public employees need not make payments to unions, and unions need not represent or provide services to those employees. The Initiative creates two

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classes of public employees, union members and those public employees who choose not to join a union. Initiative, § 3(2), (3). In the Initiative, those employees who choose not to join the union are called "independent employees." Under the Initiative, "independent employees" must negotiate their own terms and conditions of employment. A public employer cannot base an "independent employee's" wages, benefits or conditions of employment on a collective bargaining agreement. Initiative, § 3(2). Section 3 provides that it is not an unfair labor practice for a public employer to provide different wages, benefits or terms and conditions of employment to a union public employee and an independent public employee. Initiative, § 3(4).

Section 4 has two subsections. The first provides that public employees who do not join a labor union may not be required to make payments to a labor organization. The second provides that public employees who do not join a labor union and do not make payments to a labor organization "may not benefit from labor organization bargaining, representation, or services without sharing representation costs." Initiative, § 4(2).

Section 5 amends the definitions of "appropriate bargaining unit," "certification," "collective bargaining," "exclusive representative," "public employee," and "unfair labor practice" in ORS 243.650(1), (3), (4), (8), (19) and (24). Section 5 also deletes the definitions of "fair-share agreement" and "payment-in-lieu-of-dues" in ORS 243.650(10) and (18). The collective effect of those statutory amendments appears to be to exclude non-union members from appropriate bargaining units for collective bargaining purposes, and to provide that it is not an unfair labor practice for a public employer to treat union and non-union member employees differently in "employment terms."

Section 6 amends ORS 243.656(5) to provide that a purpose of PECBA is to prohibit payments by non-union members to unions.

Section 7 provides that public employees who do not join a union or renew union membership may not pay dues or "make payments-in-lieu-of-dues" to a labor organization. The reference to "payments-in-lieu-of-dues" in Section 7 is curious, in the light of the fact that Section 6 deletes the extant definition of "payment-in-lieu-of-dues."

Section 8 amends ORS 243.666 by eliminating safeguards for employees based on religious beliefs and limiting the exclusive representative obligations of a labor organization to public employees who choose to join the union.

Section 9 amends current law, which prohibits public employers from discriminating between union and non-union members. Under the Initiative, a public employer must establish different terms and conditions of employment (including wages and benefits) based on whether a public employee has joined or refused to join a union. Initiative, §§ 9(1)(a), (b), (c), 9(2)(a). Moreover, Section 9 makes it an unfair labor practice for a public employer to "[b]ase wages, benefits, and other employment terms for an independent employee on any collective bargaining agreement or other agreement which the [non-union] employee did not sign." Initiative, § 9(I)(k). *See also* Initiative, § 9(4) (prohibiting public employers from basing wages, benefits or other conditions of employment for non-union members on a collective bargaining agreement or other agreement). Subsection 9(5) mandates that public employers negotiate individually with

public employees who choose not to join a union, based on that employee's education, training, skills and experience.

Section 10 provides that a public employee union is not required to provide representation services to public employees who chose not to join the union. *See also* § 9(2)(a) (providing that it is not an unfair labor practice for a public employee union to decline to provide representation services to nonmembers).

Section 11 reiterates that, if the Initiative passes, public employees who do not join unions and do not pay for representation services may not benefit from labor organization bargaining, representation or services.

Section 12 is another policy statement. Section 13 provides that the Initiative does not apply retroactively.

The effect of the Initiative is to substantially alter the current balance in PECBA between public employers, public-employee unions, and public employees who are and are not union members. Fair share agreements and payments-in-lieu-of-dues are eliminated, as is a union's duty of fair representation to non-union members. The Initiative would change current law by requiring public employers to negotiate individually with non-union public employees in union represented appropriate bargaining units. The Initiative mandates that the public employer provide different terms and conditions of employment to union and non-union employees. Under the Initiative, it is a violation of the law if the non-union member employee's wages, benefits and conditions of employment are based on a collective bargaining agreement. And, a non-union member public employee *cannot* benefit from the terms negotiated by a public employee union for member employees in a collective bargaining agreement. The Initiative requires a public employer to provide different terms and conditions of employment (including wages) to employees with the same experience and education, performing the same job based solely on whether the employee is a union or non-union member.

III. 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 599, 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 employers cannot establish non-union employee compensation based on union contract; resulting compensation differences allowed.

Ms. Conroy respectfully submits that the caption does not accurately describe the subject matter of the Initiative. The phrase "resulting compensation differences allowed" is inaccurate, for two reasons. First, as was set forth above, the Initiative *requires* public employers to treat union and non-union members differently as to terms and conditions of employment, including wages, benefits and all other "employment terms." *See, e.g.,* Initiative, §§ 9(4), 9(5) (so providing). Accordingly, the word "allows" understates the scope of the Initiative's mandate. Second, the phrase focuses only on compensation. However, as set forth above, the Initiative's mandate extends past compensation, to include benefits and all other terms of employment. Voters must be informed of the entirety of that major effect of the Initiative.

The caption is also underinclusive, because it understates the full sweep of the Initiative. As was set forth above, the Initiative, by its own terms, drastically alters the current structure of PECBA. It eliminates fair-share agreements, the duty of fair representation to non-union employees and payments-in-lieu-of-dues. Under the Initiative, non-union member public employees in a union represented appropriate bargaining unit are now prohibited from benefitting from a collective bargaining agreement negotiated for union members in that same bargaining unit. Initiative, § 4(2). The Initiative truly unhinges the current public employer, public employee, public-employee union relationship. The Initiative's drafter has so acknowledged. *See, e.g.*, Initiative, § 3(1) ("[t]his 2016 Act fundamentally changes public employee collective bargaining * * *"). That must be reflected in the caption.

In short, the Initiative has two major effects. First, it radically revises the structure and working of PECBA, to ensure that: non-union member employees have drastically restricted rights and protections regarding terms and conditions of employment imposed by public employers; and, non-union member public employees cannot benefit from union-negotiated collective bargaining agreements. Second, the Initiative *mandates* that public employers treat union and non-union employees differently as to wages, benefits and other terms and conditions of employment. The caption does not reflect either effect sufficiently and, accordingly, 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" approved or rejected.

The results statements in the draft ballot title provide:

> "Yes" vote prevents public employer basing non-union employee compensation on union contract; resulting compensation differences allowed; employees must pay union only if benefit from representation.

"No" vote retains law allowing contracts that specify all bargaining unit employees' compensation, require non-member payments; continues prohibition against compensation encouraging/discouraging union membership.

Ms. Conroy respectfully submits that the results statements are flawed for the reasons set forth above. As with the caption, the result of yes statement: fails to convey the broad sweep of the Initiative; inaccurately states that "resulting compensation differences are allowed" when those differences are required; and, misstates that the mandated differential treatment required by the Initiative between union and non-union employees applies only to "compensation."

The last phrase in the result of yes statement – "employees must pay union only if benefit from representation" – fails to state any change the Initiative makes to current law. Under current law, the payments-in-lieu-of-dues made by non-union members who are part of a represented appropriate bargaining unit are for services received by the employee from the union. *See, e.g.* ORS 243.650(18) (defining "payment-in-lieu-of-dues"); *Towers v Rosenblum*, 354 Or 125, 130-131 (2013) (discussing Court's prior cases addressing payments by non-union members). Accordingly, that phrase does not describe a result if the measure is approved and does not comply with the requirements of ORS 250.035(2)(b).

The phrase "employees must pay union only if benefit from representation" also is misleading. Under the Initiative, only union members may pay dues or make payments to a union. A non-union member employee may not make any such payments. *See, e.g.,* Initiative, § 6(5) (prohibiting payments to union by non-union members); *id.* at § 7 (providing that public employees who do not join a union "shall not be required" to make payments to that union). The phrase does not distinguish between union and non-union member employees. A voter or potential petition signer reading the phrase reasonably could conclude that somehow under the Initiative a non-union member employee could be required to make a payment to a union.

The phrase "employees must pay union only if benefit from representation" also is inaccurate. The Initiative provides no mechanism for requiring payment by an employee to a union by a non-union employee who does benefit (either incidentally or directly) from a union's representation of that employee's bargaining unit. For example, if a non-union employee and public employee violate the provisions of the Initiative, and the non-union employee receives the benefit of terms and conditions of employment negotiated between the union and the public employer, the Initiative does not provide a means for the employee to make a payment-in-lieu-of-dues to the union.

The result of no statement is flawed for at least three reasons. First, the result of no statement does not inform voters that under current law, public employers and public employee unions cannot treat union and non-union members differently. Because the Initiative undermines that basic non-discrimination tenant, it should be conveyed in the result of no statement. Second, voters should be informed that under current law, fair-share agreements and payments-in-lieu-of-dues are allowed, so that non-union employees can receive the benefits of union-negotiated contracts and representation. Third, the last phrase is inaccurate. Current law prohibits differential treatment between union and non-union members with the intent to encourage or

discourage union membership; that treatment does not need to be based on compensation, as the no statement currently provides.

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:

- Understates the radical changes the Initiative makes to PECBA.
- Fails to state that the Initiative mandates different terms and conditions of employment (not just compensation) for union and non-union employees.
- Fails to state that the Initiative prohibits non-union employees from benefitting from union negotiated contracts.
- Misstates the scope of current non-discrimination provisions between union and non-union members and understates the extent to which the Initiative *requires* discrimination between union and non-union members.

In addition:

- The second clause in the seventh sentence – "prohibits requiring non-members to pay costs of representation unless they benefit from representation" – is inaccurate. The Initiative eliminates fair-share payments and payments-in-lieu-of-dues in their entirety. There is no exception for instances where a non-union member must pay if he or she "benefit[]s from representation."

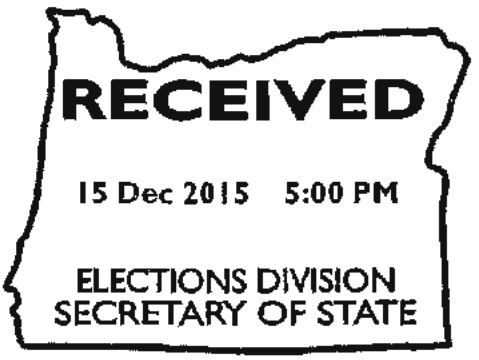
Thank you for your consideration of these comments. Please notify me when a certified ballot title is issued.

SCB:jjs
cc: client

December 15, 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 69 (2016)
Draft Ballot Title Comments

Dear Secretary Atkins:

I write as an elector in response to your Notice of October 29, 2015 inviting comments on the proposed ballot title for Initiative Petition 69 (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 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).

Initiative Petition 69 (IP 69) seeks to amend the Public Employee Collective Bargaining Act (PECBA),[1] Oregon's four decades old labor relations law for the public sector adopted to balance public employer-public employee interests and harmoniously stabilize public sector labor relations in public employment.

IP 69 is one of seven[2] initiative petitions, and the fifth by Petitioner Gibson filed to date for the 2016 election. Each addresses public employee collective bargaining reflecting a variety of schemes to eliminate "payment-in-lieu-of dues" (fair share) and authority to negotiate any

[1] ORS 243.650 *et seq*

[2] IP 32 (2016), "The Independent Public Protection Act."
IP 33 (2016), "Public Employee Choice Act."
IP 35 (2016), Public Employee Choice Act." Certified Title: "Only union public employees may benefit from union bargaining without sharing representation costs; modifies representation obligations."
IP 36 (2016), "Independent Public Employee Choice Act. Certified Title: "Only union public employees may benefit from union bargaining without sharing representation costs; modifies representation obligations." Confirmed by Oregon Supreme Court.
IP 61(2016), "No Politics from My Pay Without My Say." Prospective petition pending submission of minimum sponsorship signatures.
IP 62 (2016), No Politics from My Pay Without My Say, II." Certified Title: "Public employee union may require dues/fees for limited representation/bargaining activities; authorizes lawsuits." Petition before the Oregon Supreme Court for review pending.

provision obligating contributions by non-members to the costs of collective bargaining negotiations and contract administration.

To that end IP 69 is another attempt to separate public employees into two categories: "union public employee;" and "independent public employee" for the sole purpose of achieving that end. There have been some 80 initiative petitions submitted since 1998, with the core objective through various gymnastics of eliminating fair share from PECBA.

Contrary to what it appears petitioner was seeking to achieve, it nevertheless allows non-members to receive the benefit of the wages, terms and conditions of the collective bargaining agreement, a condition known as "free rider."

At the outset, I believe the Attorney General should not certify IP 69 for submission to the ballot for the following reasons:

1. Unlawful Delegation of Legislative Authority

Public employees, under IP 69 may self-select status as a "union public employees," or "independent public employee." Collective bargaining and representation is premised on being and maintaining membership in a labor organization. Yet, IP 69 includes no definition or other determining characteristics as to what constitutes "joining" or "membership." IP 69 is devoid of guidance, process or stratagem for determination by the Employment Relations Board (ERB) or any other body on the matter. It assigns to individuals and the numerous, separate and independent labor organizations final determination for each individual public employee on inclusion in an appropriate bargaining unit. IP 69 allows individuals to trump the ERB's bargaining unit determination authority, which is an unlawful delegation of legislative authority.

2. Discrimination on the Basis of Religion

IP 69 requires public employees who, ". . . based on bona fide religious tenets or teachings of a church or religious body of which such employee is a member . . ,"[3] to join and be a member of

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IP 62 (2016), No Politics from My Pay Without My Say, II." Certified Title: "Public employee union may require dues/fees for limited representation/bargaining activities; authorizes lawsuits." Petition before the Oregon Supreme Court for review pending.

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

a labor organization, contrary to their beliefs, in order to be covered by the terms and conditions of a collective bargaining agreement. A public employee may have a faith-based objection to *payments* to a labor organization, which current law accommodates (*ORS 243.666)* when their employment position is included in an appropriate unit. They nevertheless would still enjoy the compensation, benefits and terms and conditions of a collective bargaining agreement. IP 69 Section 8, removes the accommodation, leaving such employees without full access to all the rights expressed in *ORS 243.662*, and without any route to the benefits of collective bargaining promised by the public policy objective expressed in ORS 243.656.

Following is a more detailed examination of IP 69, the issues it addresses and underlying support for rejecting IP 69, or, should it not be rejected, problems with the draft ballot title.

I. Background

A. *Public Employee Collective Bargaining*

1. Core rights

The Pubic Employee Collective Bargaining Act (PECBA) was enacted in 1973. The Oregon Legislature has adopted, as it may for any statute, adjustments and changes to the law over its life.[4] Its core provision has remained intact from the beginning. It establishes the right of public employees to designate union (labor organization) representation. 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 employment relations.[5]

The cornerstone right guaranteed in ORS 243.662 carries no requirement or obligation for any public employee to exercise such right. Exercise of the rights guaranteed under ORS 243.662 is not premised on membership status within the labor organization seeking to represent an appropriate unit of employees. Any public employee may and can refrain from exercising that right. See, e.g., *Oregon School Employees Association v. Aumsville School District No. 11, UP-90-91, 13 PECBR 509, 516 (1992).*[6] They may, in fact, fairly act in opposition to co-workers seeking to exercise that right. Neither is there any obligation to become or remain a member to form a labor organization. There is no test of member/non-member status or commitment at any time in the representation process.

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[4] See, e.g., SB 750 (1995); HB 3342 (2013).
[5] ORS 243.662 "Rights of public employees to join labor organizations."
[6] "It should be noted that ORS 243.662 also protects employees in their right to refrain from joining or participating in union activities."

This section of PECBA is unchanged, although the effect of the total of modifications by IP 69 disturbs the meaning and application of this fundamental right.

2. Agency Administration

The PECBA is administered by the Employment Relations Board (ERB). Its responsibilities and duties, as defined in ORS 243.766, generally are to investigate and resolve disputes over appropriate bargaining units, conduct representation elections and certifications, and certifications without elections; conduct proceedings on unfair labor practice complaints and take actions necessary for enforcement of its orders; conduct hearing and make inquiries necessary to carry out its duties and powers.

3. Process

Collective Bargaining representation is not obtained by declaration. Principle elements for representation require the following: a public employer, [7] public employees,[8] labor organization,[9] an appropriate bargaining unit,[10] showing of interest,[11] certification[12] and exclusive representative.[13]

PECBA has its roots in the National Labor Relations Act (NLRA), known also as the Wagner Act.[14] The meaning of the NLRA in debate on its enactment, are best explained by its author:

> "A great deal of interest centers around the question of majority rule. The national labor relations bill provides that representatives selected by the majority of employees in an appropriate unit shall represent all the employees within that unit for the purposes of collective bargaining. This does not imply that an employee who is not a member of the majority group can be forced to enter the union which the majority favors. It means simply that the majority may decide who are to be the spokesmen for all in making agreements concerning wages, hours, and other conditions of employment. Once such agreements are made the bill provides that their terms must be applied without favor or discrimination to all employees. These provisions conform to the democratic procedure that is followed in every business and in our governmental life, and that was embodied by Congress in the Railway Labor Act last year. Without them the phrase "collective

[7] ORS 243.650(20)
[8] ORS 243.650(19)
[9] ORS 243.650(13)
[10] ORS 243.650(1)
[11] ORS 243.682(1)(b)(A), 243.682(1)(b)(B), 243.682(1)(b)(D), 243.682(3)(b),
[12] ORS 243.650(3)
[13] ORS 243.650(8)
[14] "Because of their strong background in private sector barging, the [Governor's Task Force on Collective Bargaining in the Private Sector] leaned toward a comprehensive bill modeled on the National Labor Relations Act rather than proposing fragmentary provisions that granted different rights to different groups of Public Employees." Public Sector Bargaining in Oregon: The Enactment of the PECBA, Marcus R. Widenor, LERC Monograph Series No. 8 (1989)

> bargaining" is devoid of meaning, and the very few unfair employers are encouraged to divide their workers against themselves." *Congressional Record*, 74th Cong., 1st sess., Vol. 79, 2371-72. Senator Robert F. Wagner, Speech on the National Labor Relations Act (February 21, 1935). *(emphasis added)*

PECBA's structure and elements are reflective of this statement.

A. LABOR ORGANIZATION

ORS 243.650(13) definition is: "Labor organization" means any organization that has as one of its purposes representing employees in their employment relations with public employers."

Under current law the PECBA does not regulate the internal business, organizational affairs or membership of unions. The ERB in determining status as a labor organization examines only whether the statutory definition is met. It makes no inquiry or determination regarding the internal business, organizational affairs or membership in the organization.

The structure, organization, finances, membership obligations, business operations, staffing, budget, etc. are not elements of determining labor organization status. From its earliest days, the ERB "To hold that an organization, to qualify as a labor organization under the statute, must be formally structured with a constitution, by-laws and full slate of officers, would contravene the intent of the Legislature. ORS 243.650(12), read in conjunction with ORS 243.662 and ORS 243.656, makes it clear that an organization of a group of employees formed for one or more purposes, one of which is "... representing employees in their employment relations with public employers", is a labor organization within the meaning of ORS 243.650(12), and Petitioner herein is such an organization." *Polk County I.E.D. Education Association v. Polk County I.E.D., Case No. C-179, 1 PECBR 72,73 (1974)*

IP 69 does not change the definition of labor organization,[15] though it affects the ability of a labor organization to become an exclusive representative,

B. AN APPROPRIATE UNIT

For employees desiring to exercise their statutory right, an early step generally is securing a definition and designation of an "appropriate bargaining unit."

A bargaining unit is a grouping of *job positions*. It is often misunderstood as a grouping of individual employees. Employees occupying the positions at any given time are the ones eligible to pursue rights under ORS 243.662 through showing of interest or card majority; and to vote in a representation, unit clarification or decertification election.

Whether a proposed unit is an appropriate unit is based on "such factors as community of interest, wages, hours and other working conditions of the employees involved, the history of

[15] IP 69 renumbers ORS 243.650(13) to ORS 243.650(12)

collective bargaining, and the desires of the employees."[16] Community of interest is clarified further in OAR 115-25-0050(2) to encompass "e.g., similarity of duties, skills, benefits, interchange or transfer of employees, promotional ladders, common supervisor, etc."

The ERB "has discretion to decide how much weight to give each factor listed in ORS243.682(1). *OPEU v. Dept. of Admin. Services*, 173 OR App 432, 436, 22 P3d 251 (2001). The list is not exclusive. *Id.* The board explained the importance the factors in determining an appropriate unit:

> "Commonality of interest is extremely important in determining an appropriate bargaining unit. This is so, because the resulting unit must work for the mutual benefit of all included employees. Unit determinations that ensure a sufficient community of interest help effectuate the policies of the Public Employee Collective Bargaining Act (PECBA) by decreasing potential sources of labor unrest and increasing equality of bargaining power. (citation omitted)." *Western Oregon University Federation of Teachers, Local 2278, AFT, AFL-CIO v. Oregon University System, Western Oregon University*, Case No. UC-17-09, 23 PECBR 427 (2009).
>
> Also,
>
> "We generally prefer to certify the largest possible appropriate unit. (citations omitted) We do so because of the many important public policies that are promoted by larger bargaining units. Larger bargaining units establish grater equality of bargaining power between employees and employers. They also protect the public from interruption of necessary public services because of labor disputes and work stoppages. In addition, larger units encourage workplace stability and reduce the burden that public employers would bear if they had to negotiate with many sp[linter groups. (citation omitted) Accordingly, we generally favor wall-to-wall bargaining units. We will certify a smaller unit as a fragment of the employer's work force only if the employees' community of interest in the proposed unit is clearly distinct from that of other employees, or there are other compelling reasons to create a smaller unit. (citations omitted)." *Klamath Community College Faculty Association, OEA/NEA v. Klamath Community College*, Case No. CC-03-09, 23 PECBR 484 (2010).

C. SHOWING OF INTEREST

A labor organization claiming to represent a demonstrable majority of employees in an appropriate unit may request the public employer to voluntarily recognize and bargain with it. Alternatively, a labor organization or group of employees may submit a petition for certification of representative supported by a "showing of interest" of at least 30 percent of employees in positions in an appropriate unit. Where there is doubt of majority status and/or disagreement over an appropriate unit, the ERB will investigate and conduct a representation election. Competing labor organizations may participate in the election process with at least a 10 percent showing of

[16] ORS 243.682(1)(a)

interest.[17] A majority vote determines the outcome and whether the labor organization is certified as the exclusive representative. Certification of representative also can be reached without an election with a showing of interest from a majority of employees in positions in an appropriate unit.

In all cases, PECBA requires the public employer to provide a list of employees in positions in the proposed unit in order to verify a valid showing of interest or card majority; and for an election to provide a list of eligible voters to the labor organization(s) on the ballot.[18]

D. CERTIFICATION AND EXCLUSIVE REPRESENTATIVE

Once majority representation is voluntarily recognized or certified by ERB a result of election or majority card check, the labor organization is certified as the "exclusive representative"[19] of that unit of employees.

An exclusive representative, however, is required to represent all employees in the appropriate unit. Any collective bargaining agreement it negotiates must cover all such employees without regard to member/non-member status. An exclusive representative that fails to do so is subject to unfair labor practice complaint for such failure.[20]

E. INTERFERENCE

Neither a public employer nor a labor organization may interfere with a public employee's to choose *whether or not* to exercise the rights in ORS 243.662, or for a public employee's activities *in or because* of the exercise of those rights. Acts by a public employer that intrude on this right are categorized as unfair labor practices under ORS 243.672(1); and those by a labor organization are identified under ORS 243.672(2).[21]

II. IP 69's proposed changes

A. Fair Share

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[17] ORS 243.686(1)
[18] ORS 243.686(3)
[19] ORS 243.650 Definitions for ORS 243.650 to 243.782. "As used in ORS 243.650 to 243.782, unless the context requires otherwise:
***
"(8) "Exclusive representative" means the labor organization that, as a result of certification by the board or recognition by the employer, has the right to be the collective bargaining agent of all employees in an appropriate bargaining unit."
[20] ORS 243.672(2)(a).
[21] Complaints of such acts are processed and orders may be issued by the ERB, which in turn may be appealed to the Oregon Court of Appeals.

Because the primary objective of IP 69 (*Section 1(3)*) is deletion from the PECBA fair share (payment-in-lieu-of-dues) provisions. (*IP 69 Sections 1(2), 5(10, 9(1)(c), and 12).* It is useful to review the actual operation of fair share.

Generically known as agency fee, "fair share" is a provision authorized by ORS 243.650(10).[22] 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 may and do conclude without any non-member fee obligation. There are contracts in force today in Oregon that do not contain any fair share agreement. Even when fair share agreements are included, PECBA provides an opportunity for represented employees to revoke authority of the labor organization to enter such an agreement.[23] In addition, the authorization in ORS 243.666(1)[24] safeguards the rights of those with religious objection to payments of any kind to a labor organization. The amount is based on that portion of member dues that are attributable only to collective bargaining negotiations and contract administration.

Public discussion and debate, and reports of them, usually conflates or confuses "representation" with "membership;" and "dues" with "fees," often using them interchangeably; and mistaking and substituting terms such as "union shop" for "agency fee" or "fair share." Likewise, such discussions often, and mistakenly, assert that fees require support of union expenditures beyond collective bargaining and contract administration, and especially political and ideological activities and expenditures. For example, "union shop,"[25] denoting that all represented employees become and maintain membership in the labor organization, is unlawful under PECBA. See, e.g. *OSEA v. Oregon State University*, 2 PECBR 958 (1977); affirmed, 30 OR App 757 (1977).

Each of these terms has a separate and distinct meaning. Representation is described above. Dues are the obligation of a member to become and maintain their membership, along with rights and privileges of membership in their organization. Membership in the labor organization is an individual, voluntary choice of employees in forming a labor organization of their choice and in choosing to "join and participate."

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[22] "'Fair-share agreement'" means an agreement between the public employer and the recognized or certified bargaining representative of public employees whereby employees who are not members of the employee organization are required to make an in-lieu-of-dues payment to an employee organization except as provided in ORS 243.666."

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

[24] ORS 243.666 provides that: "(1) . . . Nevertheless any agreements entered into involving union security including an all-union agreement or agency shop agreement must safeguard the rights of nonassociation of employees, based on bona fide religious tenets or teachings of a church or religious body of which such employee is a member. Such employee shall pay an amount of money equivalent to regular union dues and initiation fees and assessments, if any, to a nonreligious charity or to another charitable organization mutually agreed upon by the employee affected and the representative of the labor organization to which such employee would otherwise be required to pay dues. The employee shall furnish written proof to the employer of the employee that this has been done."

[25] The common term for "all union agreement."

Fair share fees are limited to the labor organization's actual costs for "core" activities: collective bargaining negotiations, contract administration and grievance adjustment. Such fee *cannot* include amounts unrelated to contact negotiations and administration. See *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). They must *exclude* any portion of expenditures related to political and ideological costs. See, e.g. *Shirley Carlson, et al v. AFSCME*, 7 PECBR 6224 (1984); amended in 7 PECBRA 6297 (1984); affirmed in part and reversed in part in 73 Or App 755; review denied 300 Or 332 (1985).

The U.S. Supreme Court has consistently approved of collection of fair share fees to support the obligation of an exclusive representative to bargain for and represent all employees in an appropriate. It expressed concern over the effects of "free riders," that is, those employees required to be represented by the labor organization who enjoy all of the benefits and protections of the collective bargaining agreement, but make no contribution to the costs of that service and activity. The labor organization may enter a fair share agreement for defraying the costs of collective bargaining and contract administration among all those represented. However, the labor organization must establish its fair share fee through an audit of its costs to determine the percentage of dues that are attributable only to collective bargaining and contact administration purposes; provide an opportunity for represented public employee fee payers to register objections to that amount; and, if unresolved, submit contest to a neutral arbitrator. See *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991). These limitations and requirements are not unique to public employees. See, e.g., *Communications Workers of America v. Beck,* 487 U.S. 735 (1988); *Ellis v. Brotherhood of Railway Employees*, 466 U.S. 435 (1984).

B. Changes

All of the changes in IP 69 are intended to shortstop application of provisions of the collective bargaining law in the wake of removing fair share.

IP 69 leaves the definitions of public employer, labor organization and showing of interest undisturbed. IP 69 alters the definitions of:

- public employee, by bifurcating public employer's workforce into categories of "union public employee" and "independent public employees" and modifying, limiting or removing rights of each. (*Section 1(2)*, 3(2), 3(3), *5(1), 5(17), 11 and* 17);
- collective bargaining, by limiting its reach and application to those who have joined the exclusive representative *(Section 5(1))*
- appropriate bargaining unit, by limiting it to only those who join the union (labor organization) and precluding those who do not from "representation services." (*IP 69 Section 5(1)* and *10(2)*)
- certification, by providing such recognition only for labor organizations to represent those who join (*Sections 5(1)* and 5(3));
- exclusive representative, by limiting one to mean the agent only of those who have joined (*Sections 5(1)*), 5(8))

- Unfair labor practices, by precluding comparison of employment terms between the classes of public employees (*Section 5(22)*). It relieves public employer from charges of discrimination for setting employment terms and conditions for "independent" employees. (*Sections 9(1)(a), 9(1)(c))* But, it makes it unlawful for a public employer to base "wages, benefits, and other employment terms for independent employees on a collective bargaining agreement or other agreement which the independent employee did not sign; and making it similarly unlawful for a public employer to base "wages, benefits, and other employment terms for union employees on the employment terms of independent employees." (*IP 69 Section 9(4))* It requires public employers to base such terms for independent employees "on the employee's individual education, experience, training, skills, and performance." For Such terms for union employees will be based on the applicable collective bargaining agreement. Comparing such terms as they apply to each class of employee is exempted from unfair labor practices. *(IP 69 Section 9(5))*

  It removes protections for public employees from discrimination by public employers for activities "in or because of" the exercise of rights in 243.662 (*Sections 9(1)(a),(c),(j) and (k))*. But, establishes new unfair labor practices against labor organizations to enter any agreement requiring payments from non-members. *(Section 9(2)(h))*

III. Effects of IP 69

Chaos. That single word best describes the impact of IP 69 on public employers' ability to manage and direct their employment relations; on the ERB to administer the PECBA; and on public employees' pursuit of their rights.

It will be chaotic for employee's to seek representation and the ERB to make appropriate unit determinations. Under the new condition that membership in the labor organization is the deciding factor in allowing employees to engage in collective bargaining activities, it is unclear and indeterminable at what point that is applied. What now is a showing of interest? How can an employer provide its list of employees to verify a valid showing of interest? Is membership tested as the initial step or final step in unit determination? What about a voter eligibility list for a representation election? Or, authorization cards for majority representation without an election.

In addition to eliminating fair share, Petitioner's zeal to avoid application of other parts of the PECBA, requires public employers to bifurcate its workforce into union and independent employees. First, public employers may wages, benefits, hours and terms and conditions on the job/position for individual public employees. Instead, it must develop uniquely tailored wages, benefits, hours and terms and conditions (hereafter "wages, etc.") on "on the employee's individual education, experience, training, skills, and performance." The entire structure of a public employer's human resources programs must be altered to accommodate IP 69's proposed changes, once any of its employees become organized. Because these terms may not be compared or in synch between the two classes of employees under IP 69, the public employer is

confronted having at least as many different sets of wages, etc. as it does collective bargaining agreements and unrepresented individual public employees.

A public employer also is faced with having to create and maintain different wages, etc. employees employed in identical positions with the same duties and responsibilities. For example, an ERB determined appropriate unit might include all Administrative Assistants. One joins and is covered by the collective bargaining agreement. The other does not. The employer is required to have to create different wages, etc. for exactly the same position; and not based on the requirements of the job/position, but on "the employee's *individual* education, experience, training, skills, and performance." Should that employee later choose to Should the first employee drop or not renew membership, the public employer must revise their wages, etc. from that under the contract to a new one unique to that "employee's *individual* education, experience, training, skills, and performance." It is unlawful for a public employer to do anything but this under IP 69. *(See Sections 9(4) and 9(5)))*

Maintaining separate but not equal wages, etc. for employees in the same job/positions subject the employer to violations of the Fair Labor Standards Act, should the identical jobs/positions be occupied by different genders; as well has Oregon employment laws requiring equal pay for comparable work.

Should that first employee leave the bargaining unit – which IP 69 leaves to self-determination and at any time – the practical effect is that employee will remain with the same wages, etc. until the employer can devise a new set of wages, etc. There always will be an interval in the transition between union and independent employee when they travel as a "free rider" having the benefit of the negotiated agreement.

The scheme proposed by IP 69 actually destabilizes the workplace, the exact opposite of the purpose of the PECBA. It interferes with public employers' rights to design, control and operate employment in their units of government. It regulates analysis, authorization, creation, and duties and responsibilities of jobs/positions in their workforces. The current PECBA does none of this. IP 69 would.

IP 69 is dislocating. Because it applies not just to new organizing, but to hundreds and hundreds of contracts covering many 10s of thousands of public employees at all levels of government, these scenarios will occur upon the expiration, extension and renewal of all those current agreements. The impact of IP 69 in redesigning the PECBA is exponential.

IV. The Draft Title

A. Caption

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). The substantial reworking of the PECBA is a major change that "likely would be significant to the voting public." Sizemore v. Myers/Terhune, 342 OR 578.

The draft caption is:

> **"Public employers cannot establish non-union employee compensation based on union contract; resulting compensation differences allowed."**

This caption misses the point entirely. It does not capture the real effects of IP 69, which as explained above, redesigns the entire collective bargaining arrangement for public employees and public employers. It does not reflect the separation of public employees into two classes, the limitation on collective bargaining representation, the requirement for membership to engage and maintain collective bargaining representation, or new restrictions on public employers in determining and setting wages, etc.

Finally, it overlooks its primary objective to remove fair share and the "free rider" effect, nevertheless in the transition from union public employee to independent public employee. It mischaracterizes the full, plain text. The misstatement would be misleading to petition signers and voters.

The Attorney General should be guided in addressing the "free rider" by IP 9 (2014) resulted in the certified title: "Allows non-union member public employees receiving required union representative to refuse to share representation costs." IPs 35 and 36 (2016) received the certified title: "Non-union public employees may benefit from union bargaining without sharing representation costs; modifies collective bargaining obligations."

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 builds on the caption telling 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*, 336 Or 424, 431 (2003).

1. Result of "Yes" Vote

The draft "Yes" Result Statement reads:

> **"Result of "Yes" Vote: "Yes" vote prevents public employer basing non-union employee compensation on union contract; resulting compensation differences allowed; employees must pay union only if benefit from representation."**

This result statement to narrowly tailored and misses the actual is deeply flawed. It ignores the full range of requirements IP 69 places on public employees and employers. It breadth is far wider than merely focusing on compensation. It fundamentally changes to nature of collective bargaining and representation under the PECBR. That breadth presents a challenge to encapsulate in 25 words all of its characteristics. Nevertheless, ORS 250.0035(2)(b) requires a "simple and understandable statement of not more than 25 words that describe the result if the state measure is approved." The purpose is to "notify petition signers and voters the result or results of enactment that would have the greatest importance to the people of Oregon." *Novick v. Myers*, *Id.* at 574.

2. Result of "No" Vote

The draft "No" Result Statement reads:

> **"Result of "No" Vote: "No" vote retains law allowing contracts that specify all bargaining unit public employees' compensation, require non-member payments; continues prohibition against compensation encouraging/discouraging union membership."**

ORS 250.0035(2)(b) requires a "simple and understandable statement" also limited to 25 words, that described the "state of affairs" that describe the *status quo* if voters reject the initiative. Again, the breadth of IP 69 is missed by limiting this result statement to the single area of compensation. For the reasons detailed above, this statement should capture the full breadth of the current law respecting collective bargaining representation.

C. Summary Statement

A ballot title is required under ORS 250.036(2)(d) to contain a statement of up to 125 words that accurately summarizes the measure and its *major effects*. It should provide petition signers and voters with information enough to understand what happens if they approve the measure. The statement should reflect the "breadth of its impact." *Fred Meyer, Inc v. Roberts*, 308 Or 69, 175.

The draft Summary statement reads:

> **"Summary: Currently, public employees in a bargaining unit may be represented by a union. Union membership cannot be required as condition of public employment. Union represents (in negotiations, contract enforcement) all public employees in bargaining unit. Collective bargaining agreements can require**

> **represented non members to share the costs of the legally-required union representation. Compensation differences to encourage/discourage union membership are prohibited. Measure prevents public employer from establishing non-union employee compensation, employment terms by union contract, allows compensation differences. Measure removes requirement that public employee unions represeut non-members; prohibits requiriug non-members to pay costs of representation unless they benefit from representation; union members must renew membership anuually. Measure applies to new, renewed, or extended contracts entered into after the effective date of the measure. Other provisions."**

This draft summary is goes a long way to correctly explain the effects of IP 69. However, it fails to capture in its changes that the changes are intended to eliminate fair share and make membership in the labor organization the central feature in exercising collective bargaining rights. It does not reflect the new burden on public employers for separating and maintaining two classes of public employees.

V. IP 69 should not be certified

As I noted above, I believe IP 69 is an unlawful delegation of legislative authority. It leaves to individuals to determination of the application of ORS 243.65 *et. seq.* It is without guidance of any kind of what constitutes membership. It leaves that determination to individuals and their organizations.

The initiative power is legislative, akin to acts of the Legislature, and is treated as such.

The Oregon Courts have spoken on what constitutes unlawful delegation:

> "When, as in this case, governmental power to make decisions granting or denying privileges is, in whole or in part, delegated to private individuals who have a self-interest in the decisions, accountability is necessarily attenuated.
> ***
> "We have thus succinctly articulated our task in reviewing for an unlawful delegation as follows: "The test for determining whether a particular enactment is an unlawful delegation of legislative authority or a lawful delegation of factfinding power is whether the enactment is complete when it leaves the legislative halls. A legislative enactment is complete if it contains a full expression of legislative policy and sufficient procedural safeguards to protect against arbitrary application." *State v. Self*, 75 Or App 230, 236-37, 706 P2d 975 (1985) (citations omitted)." City of Damascus v. Brown 255 Or App 416, 440-443 (2014)

V. 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 69 invalid because it mixes statutory and constitutional provisions, and 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
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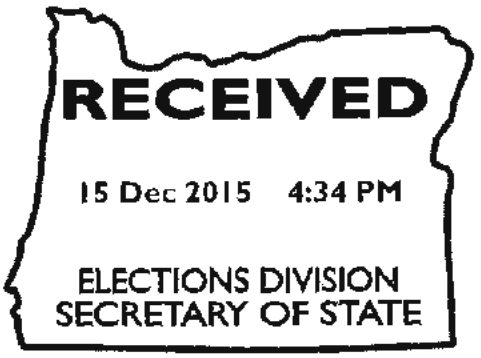
GIBSON
LAW FIRM

December 15, 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 69 (2016)

Dear Secretary Atkins,

I am the Chief Petitioner of IP 69, an elector in the State of Oregon, and would like to offer comments on IP 69's draft ballot title. Thank you for the opportunity to provide these comments.

I. INTRODUCTION

IP 69 would amend the Oregon Public Employee Collective Bargaining Act (PECBA), found at ORS 243.650 *et seq*. PECBA allows public employees ("employees") to be represented by public employee unions ("unions"). Although employees in a collective bargaining unit are not required to join the union as full members, non-member employees may be required to pay full union dues as a condition of employment. ORS 243.650 (18) (PECBA allows unions to enter into agreements that require payments-in-lieu-of-dues from employees who choose not to join a union.). Non-members must pay these dues to cover the costs of the representation services unions must provide to non-members.

IP 69 focuses on and proposes to change non-member union dues, which are considered both "compulsory" and "fair." *See, e.g., See Knox v. SEIU*, 567 U.S. ___, ___ (slip op at 27) (2012) ("When a state establishes an agency shop that exacts *compulsory* union fees as a condition of public employment, [t]he dissenting employee is forced to support financially an organization with whose principles and demands he may disagree.") (emphasis added) (internal citation omitted); ORS 243.650 (10) ("*Fair*-share agreement" means an agreement between the public employer and the recognized or certified bargaining representative of public employees whereby employees who are not members of the employee organization are required to make an in-lieu-of-dues payment to an employee organization . . . .") (emphasis added). Although non-members and unions may describe these payments differently, it is indisputable that the legal obligations - on both non-members and unions - that form the basis of these payments are involuntary.

The relationship between non-members and unions is involuntary and imposed by law. In short, pursuant to PECBA, non-members are required to pay union dues because unions are required to represent non-members. IP 69 would remove both of these requirements and the resulting required association and relationship between non-members and unions. The measure continues to require that both groups be treated fairly vis-à-vis each other, but IP 69 does not compel corresponding payments and services. The measure would allow employees to choose whether or not they want to be a member of a union, and those that declined membership would not receive services from the union and would not be required to pay for such services. On the other hand, employees who choose to join the union would receive and pay for union representation services. This arrangement is fair and balanced. Clearly, it would be unfair to require unions to represent non-members but relieve non-members of their duty to pay unions (resulting in "free riders"). Similarly, it would be unfair to require non-members to pay unions but relieve unions of their duty to represent non-members. Thus, to maintain fairness, IP 69 must simultaneously effect the current requirements of both groups.

It is a key feature of IP 69 that it would not make one-sided changes, but proposes changing the relationship between non-members and unions in a way simultaneously effects *both* parties. For this reason, IP 69 explicitly links the proposed change to non-members' duties towards unions with the proposed change to unions' duties towards non-members. For example,

- Section 3 states: "This 2016 Act fundamentally changes public employee collective bargaining so that independent employees may not be required to make payments to a labor organization against their will and labor organizations may not be required to provide services to independent employees."

- Section 4 states: "(1) Compulsory payments to labor organizations by public employees who choose to not join a labor organization shall be prohibited. (2) Public employees who choose to not join or pay a labor organization may not benefit from labor organization bargaining, representation, or services without sharing representation costs."

- Section 10 states: "(1) A labor organization is not required to collectively bargain for or provide any type of service to public employees who choose not to join a labor organization and who do not pay for such services."

- Section 11 states: "Notwithstanding any other provision of law, public employees who choose not to join a labor organization may not benefit from labor organization bargaining, representation, or services without sharing representation costs."

To accurately and fairly describe the proposed change to the relationship between non-members and unions, is critical that the ballot title identify the proposed changes to *both* non-members and unions. It would be misleading and unfair to describe only one side of this change.

In order to effectuate this proposed change, IP 69 had to amend other aspects of PECBA to avoid the unintended consequence of creating "free riders." A similar initiative, IP 35, was interpreted by the Attorney General as requiring public employers to give non-members the same compensation as members to avoid committing an unfair labor practice. To avoid this effect, IP 69 explicitly prohibits employers from basing non-member compensation upon a collective bargaining agreement and instead requires such compensation to be based on "individual education, experience, training, skills, and performance." Section 3(2); Section 9(5). IP 69 makes it clear that employers do not commit an unfair labor practice by basing a non-member's compensation on the employee's individual merit. Similarly, it is not an unfair labor practice to establish member compensation on the applicable union contract.

II. DRAFT BALLOT TITLE

Although the actual major effect of IP 69 is to prohibit compulsory union payments by non-members and prohibit compulsory union representation of non-members, the draft ballot title does not sufficiently convey this effect to potential signers and voters. Also, the draft caption misrepresents IP 69 as being one-sided by failing to describe both aspects of the proposed change to employee compensation. The Attorney General has proposed the following ballot title for IP 69:

Public employers cannot establish non-union employee compensation based on union contract; resulting compensation differences allowed

Result of "Yes" Vote: "Yes" vote prevents public employer basing non-union employee compensation on union contract; resulting compensation differences allowed; employees must pay union only if benefit from representation.

Result of "No" Vote: "No" vote retains law allowing contracts that specify all bargaining unit public employees' compensation, require non-member payments; continues prohibition against compensation encouraging/discouraging union membership.

Summary: Currently, public employees in a bargaining unit may be represented by a union. Union membership cannot be required as condition of public employment. Union represents (in negotiations, contract enforcement) all public employees in bargaining unit. Collective bargaining agreements can require represented non-members to share the costs of the legally-required union representation. Compensation differences to encourage/discourage union membership are prohibited. Measure prevents public employer from establishing non-union employee compensation, employment terms by union contract, allows compensation differences. Measure removes requirement that public employee unions represent non-members; prohibits requiring non-members to pay costs of representation unless they benefit from 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.

III. COMMENTS ON THE DRAFT BALLOT TITLE

A. The Caption

Under ORS 250.035(2)(a), the caption is limited to fifteen words and must "reasonably identif[y] the subject matter" of a measure - described in case law as its "actual major effect" or, if more than one major effect, all effects describable within the available word limit. *Lavey v. Kroger*, 350 Or 559, 563, 258 P3d 1194 (2011); *see also Greenberg v. Myers*, 340 Or 65, 69, 127 P3d 1192 (2006) (Attorney General may not select and identify in caption only one of multiple subjects, such that caption understates scope of subject matter). Because the caption is the "cornerstone" of the ballot title, it must identify the subject matter of the proposed measure in terms that will "inform potential petition signers and voters of the sweep of the measure." *Terhune v. Myers*, 342 Or 475, 479, 154 P3d 1284 (2007); *see also Greene v. Kulongoski*, 322 Or 169, 174-75, 903 P2d 366 (1995) (explaining that caption may not obscure measure's effect or make it difficult for voters to understand measure's subject). Finally, a caption that is underinclusive, because it fails to inform voters of all the major effects of an initiative, is statutorily noncompliant. *Towers v. Myers*, 341 Or 357, 362, 142 P3d 1040 (2006).

As described above, IP 69 maintains the balance and fairness contained in current law. IP 69 does not place a prohibition upon a party without giving that party a new right, and vice versa. Similarly, the measure does not delete applicable compensation criteria without replacing it with new criteria. Regarding non-member compensation, IP 69 does not simply state that employers cannot base such compensation on the union contract; the measure explicitly requires employers to base non-member compensation on "individual education, experience, training, skills, and performance." Section 9(5). Giving non-members the right to compensation based on their individual merit is a "new, affirmative guarantee" that should be mentioned in the caption (if the caption focuses on employee compensation). *See Kendoll v. Rosenblum*, __ Or __, __, __ P3d __ (Nov. 27, 2015) (slip op at 7-8) ("new, affirmative guarantee – enforceable by declaratory judgment action – is a significant component of the subject matter of [the measure] that the caption should highlight for potential voters")(citing *Fred Meyer, Inc. v. Roberts*, 308 Or 169, 173-74, 777 P2d 406 (1989) (in selecting caption wording to accurately describe subject matter of proposed measure, court considered extent to which measure continued or, by contrast, potentially altered state of current law). Similar to the new right created in *Kendoll*, non-members' new right to receive compensation based on their skills and performance would be enforceable through ORS 243.672 and is a significant component to the subject matter regarding employee compensation. The failure to let potential voters know that non-members would be entitled to compensation based on their individual merit – which could result in a higher compensation – renders the caption misleading because it appears that non-members would be left with no protection or criteria regarding their compensation. However, this is far from correct and puts the measure in a negative light. As currently drafted, the caption will likely cause voters to not support the measure because it is portrayed as being unfair to non-members. To correct this insufficiency, if the caption focuses on employee compensation, it must identify the

new non-member compensation criteria, such as "Public employers must establish non-union member compensation on individual skills/performance, not on union contract."

However, focusing on employee compensation is still underinclusive because it does not alert voters to the significant change made regarding payments for services, and voters may believe that it is unfair to not base non-member compensation on the union contract if non – members are paying for union representation. For this reason, the caption should describe the measure's actual major effect: non-members are not required to pay union dues and unions are not required to represent non-members. There are many ways this actual major effect can be described, including "non-members not required to pay for union services not received" or "unions not required to represent employees who do not pay dues," and I have no doubt the Attorney General can craft other equally compliant language, but this subject matter must be identified in the caption. As the Oregon Supreme Court has recognized, "trying to describe all the major effects of a multifaceted, complex measure in 15 words can be difficult, and sometimes not possible. At times, it may be necessary to describe those effects generally. However, the caption still must 'reasonably identify' the subject matter of the measure." *McCann v. Rosenblum*, __ Or __, __, __ P3d __ (S061799) (2014) (slip op at 7) (internal citation omitted).

The draft caption is underinclusive and fails to identify the subject of the measure because the measure goes far beyond establishing rules regarding employee compensation. Indeed, the provisions regarding employee compensation are to effectuate the larger effect of the measure: to prohibit compulsory union dues from non-members and to prohibit compulsory representation of non-members. The current caption is so narrowly phrased that voters will not be informed of the scope of the measure. *See Baker v. Keisling*, 312 Or 385, 391-92, 822 P.2d 1162 (1991) ("The certified caption is so narrowly phrased as to cause the voter, for whose use the caption is intended, to be inaccurately informed about the scope and coverage of the measure.").

Here, the absence of this subject matter is not due to a word limitation, given that the caption unnecessarily identifies a secondary effect. The caption states "resulting compensation differences allowed," and while this is one possible effect of IP 69, the caption should focus on what the measure explicitly forbids and allows, not on secondary effects that might follow. Even if this secondary effect is a certainty, it should be identified in the summary to allow room in the caption so that the actual major effect of the measure may be identified. Moreover, this phrase is unnecessary because if the first portion of the caption is retained - "Public employers cannot establish non-union employee compensation based on union contract" – voters will already understand that compensation differences would be allowed. If voters are told that employers may not establish non-member compensation based on the union contract, then voters will know that non-member compensation may be different than what is in the union contract. Because it logically follows that non-member compensation may be different, the phrase "resulting compensation differences allowed" is redundant and unnecessary. Thus, it should be removed to allow more words devoted to the actual major effect of IP 69.

To summarize my arguments regarding the caption, the caption must identify the measure's actual major effect, which is to simultaneously relieve both unions and non-members of obligations that currently exist in PECBA. This effect can be described as follows:

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

Or

Public employee unions not required to represent non-members; non-members not required to pay representation costs

Or

Public union non-members not required to pay representation costs; unions not required to represent non-members

There are numerous ways the caption can be written to comply with ORS 250.035(2)(a). In fact, the draft summary contains a sentence that could serve as the caption: "Measure removes requirement that public employee unions represent non-members; prohibits requiring non-members to pay costs of representation unless they benefit from representation." This could easily be cut down to 15 words to state: "Removes requirement that public employee unions represent non-members; prohibits requiring non-members to pay representation costs." However, assuming the Attorney General believes the actual major effect of the IP 69 is the proposed change to employee compensation, that change must be described fairly and accurately by alerting potential voters that non-members would have their compensation based on their individual skills and performance. The following suggested caption uses the Attorney General's language from the draft "yes" vote result statement and sufficiently captures all major effects of IP 69:

Employees pay public employee union only if receive representation; individual merit determines nonpaying employee compensation

B. The Result of "Yes" Vote Statement

ORS 250.035(2)(b) requires a ballot title to contain a "simple and understandable statement," of not more than 25 words, explaining what will happen if the measure is approved. As the Oregon Supreme Court has observed, the "yes" vote result statement should describe "the most significant and immediate" effects of the ballot initiative for "the general public." *Novick/Crew v. Myers,* 337 Or 568, 574, 100 P.3d 1064 (2004).

The draft "yes" vote result statement suffers from the same deficiencies as the caption because it fails to identify the actual major effect of prohibiting compulsory representation and compulsory payment of union dues. And similar to the caption it also unfairly and inaccurately describes the proposed change to employee compensation because it does not identify the new non-member criteria. The "yes" statement should be modified to correct these deficiencies.

C. The Result of "No' Vote Statement

ORS 250.035(2)(c) requires a ballot title to contain a "simple and understandable statement," of not more than 25 words, explaining what will happen if voters reject the measure. This means that the statement must explain to voters "the state of affairs" that will exist if the initiative is rejected, i.e. the status quo. Also, a "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." *Novick/Crew* at 577, 100 P.3d 1064 (emphasis in original).

The "no" statement" does not adequately describe current law regarding the subject matter of the IP 69, i.e. compulsory union dues and compulsory union representation. Additionally, the phrase "'No' vote retains law allowing contracts that specify all bargaining unit public employees compensation" is inaccurate because a "yes" has the same effect. If IP 69 passes, a collective bargaining agreement could still specify the compensation for "all bargaining unit public employees." IP 69 does not change this; what IP 69 changes is *who* is included in the bargaining unit. The measure excludes non-members from collective bargaining units; thus, a correct statement regarding the current law regarding bargaining units would be "'no' vote retains law requiring non-members to be included in bargaining unit." However, more importantly, the "no" statement should address the subject matter of IP 69, and the composition of bargaining units is not the subject matter.

Additionally, the phrase "continues prohibition against compensation encouraging/discouraging union membership" is incorrect because IP 69 does not ban this prohibition. Section 9 of the measure explicitly maintains the current provision of ORS 243.672(1)(c) that makes it unlawful to "[d]iscriminate in regard to hiring, tenure or any terms or condition of employment for the purpose of encouraging or discouraging membership in an employee organization." The measure clearly maintains this prohibition that exists in current law.

D. The 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 contains some of the defects discussed above. Specifically, it is unfair and underinclusive to omit the criteria that would be used to establish non-member compensation: individual merit. Also, the forth sentence should be delete "represented" because it is redundant with "representation." Thus, the sentence should read, "Collective bargaining agreements can require non-members to share the costs of the legally-required union representation." This sentence should also move up so that it follows the second sentence regarding union membership not being required. These two sentences both discuss requirements of employees and putting them together will assist voters' understanding of those requirements.

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

CERTIFICATE OF FILING

I certify that I directed the original PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition #2016-069) to be electronically filed with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system pursuant to ORAP 16 on January 15, 2016.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition #2016-069) upon the following individuals on January 15, 2016, by delivering a true, full and exact copy thereof via U.S. Mail to:

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and have given notice to the Secretary of State by email to irrlistnotifier.sos@state.or.us:

Jeanne Atkins, Secretary of State
Elections Division
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Salem, Oregon 97310-0722

DATED January 15, 2016.

BENNETT, HARTMAN, MORRIS & KAPLAN, LLP
s/Margaret S. Olney
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