IN THE SUPREME COURT OF THE STATE OF OREGON

| | |
|---|---|
| JILL GIBSON,<br><br>Petitioner,<br><br>v.<br><br>ELLEN F. ROSENBLUM,<br>Attorney General,<br>State of Oregon,<br><br>Respondent. | Case No.<br><br>PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL<br><br>Initiative Petition 69 (2016) |

BALLOT TITLE CERTIFIED
December 31, 2015
Initiative Petition 69
Chief Petitioner: Jill Gibson

Jill Gibson, OSB #973581
Gibson Law Firm, LLC
1500 SW Taylor St.
Portland, OR 97223
jill@gibsonlawfirm.org
P: 503.686.0486
F: 866.511.2585

*Attorney for Petitioner*

Ellen F. Rosenblum, OSB #753239
Attorney General
Denise G. Fjordbeck, OSB #822578
Attorney-in-Charge
Civil/Administrative Appeals
Department of Justice
1162 Court St., NE
Salem, OR 97301-4096
denise.fjordbeck@doj.state.or.us
P: 503.378.4402
F: 503.378.3997

*Attorneys for Respondent*

# I. PETITION TO REVIEW BALLOT TITLE

Petitioner Jill Gibson is the chief petitioner of IP 69, an elector of this State, a person dissatisfied with the ballot title, and adversely affected by Respondent's actions. Petitioner timely submitted written comments concerning the draft ballot title and has standing to seek review pursuant to ORS 250.085(2).[1]

# II. ARGUMENTS AND AUTHORITIES

A. 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 unionized workplace 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 that unions provide to non-members.

[1] A copy of IP 69 is attached as Exhibit 1; the draft ballot title is attached as Exhibit 2; Petitioner's comments are attached as Exhibit 3; the Attorney General's explanatory letter is attached as Exhibit 4; and the certified ballot title is attached as Exhibit 5.

IP 69 focuses on and proposes to change non-member union dues, which are often described as either "compulsory" or "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 the United States Supreme Court[2], 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. In short, non-members are required to pay union dues and unions are required to represent non-members.

[2] The United States Supreme Court has recently expressed hostility towards "compulsory" union dues and on January 11, 2016, heard oral argument in *Friedrichs v. California Teachers Union*, No. 14-915, in which the Court is expected to declare such dues unconstitutional. Petitioner submitted an *amici curiae* brief in Friedrichs: http://www.scotusblog.com/wp-content/uploads/2015/09/14-915-tsac-Glenn-J-Schworak-and-James-E-Mitchell-00000003.pdf.

IP 69 would remove both of these requirements and the resulting compelled association between non-members and unions. The initiative continues to require that both groups be treated fairly vis-à-vis each other, but IP 69 does not require corresponding payments and services. The initiative would allow employees to choose whether or not they want to join a union, and those that decline membership would not receive services from the union and would not pay for such services. On the other hand, employees who choose to join the union would receive and pay for representation services. This arrangement is fair and balanced.

It is a key feature of IP 69 is that it would not make one-sided changes. For this reason, IP 69 explicitly links the proposed changes to non-members' and unions' duties towards each other:

- Section 3 states, "[I]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, "[P]ublic employees who choose not to join a labor organization may not benefit from labor organization bargaining, representation, or services without sharing representation costs."

In order to effectuate these proposed changes, IP 69 proposes to amend other aspects of PECBA to avoid the unintended consequence of creating "free riders." A similar initiative, IP 35 (2016), was interpreted by the Attorney General as requiring public employers to give non-members the same compensation as members, which resulted in "free riding." To prevent this, IP 69 prohibits employers from basing non-member compensation on 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). It is a key feature of IP 69 that it does not leave non-members without protection, but expressly requires their compensation to be based on merit.

B. <u>The Ballot Title Unfairly Focuses on the Rights Non-members Would Lose and Does Not Describe the Rights Non-members Would Gain</u>.

Currently, non-members and unions have reciprocal duties to each other: non-members must pay unions and union must represent non-members. But, as mentioned above, this arrangement is involuntary. IP 69 seeks to change this compelled association between unions and non-members, but does so in a way that

maintains the fairness and balance between the two parties. As such, the initiative does not take away a current right/benefit without giving a new right/benfit. For example, under IP 69, unions would lose the right to non-member payment, but would gain the right to decline representation of non-members. Also, under IP 69 non-members would lose the right to compensation based on a collective bargaining agreement, but non-members would gain the new right to be compensated according to their own merit. Even Commenters Hanna Vaandering and Trent Lutz admit that "IP 69 creates a right that does not otherwise exist for public employee to bargain with their employers and have their employment terms set based on specified criteria." Vaandering/Lutz Comment Letter at 7.

Because the ballot title unfairly focuses on what non-members would lose, with absolutely no mention of one right they would gain, this Court should require Respondent to modify the ballot title so it tells the whole story.

1. <u>The Caption is Slanted Towards Defeat</u>

ORS 250.035(2)(a) requires a ballot title to contain "[a] caption of not more than 15 words that reasonably identifies the subject matter of the state measure." As the "headline" for the ballot title, the caption "provides the context for the reader's consideration of the other information in the ballot title." A caption complies substantially with the requirements of ORS 250.035(2)(a) if it identifies the subject matter of the proposed measure in terms that will not confuse or

mislead potential petition signers and voters. *Mabon v. Myers*, 332 Or 633, 33 P3d 988, 990 (2001).

Petitioner recognizes that IP 69 has several actual major effects; specifically four: #1) it prohibits compulsory payment of union dues by non-members; #2) it prohibits compulsory representation of non-members by unions; #3) it requires employers to compensate non-members based on individual merit; and #4) it prohibits employers from compensating non-members based on a union contract. Two of these effects are generally beneficial to non-members (#1 and #3) and two are generally detrimental (#2 and #4), and the opposite is true for unions. Petitioner also recognizes that all such effects cannot be identified in fifteen words; however, Respondent has picked the two effects that are negatives for non-members (#2 and #4). The caption alerts voters that non-members would lose the right to receive contract-based compensation and lose the right to receive union representation, but says nothing about the new right to not be required to pay union dues or the new right to merit-based compensation.

This results in a very one-sided and slanted caption. As this Court has stated, a caption may not "tell half the story." *Hunnicutt v. Myers*, 340 Or 83, 127 P3d 1182, 1184 (2006). In *Hunnicutt* this Court stated, "[T]he caption implies that the measure would eliminate a public body's ability to waive the land use laws in certain situations *but leave the public body obligated to pay* just compensation.

Because the caption is underinclusive and thus inaccurate, we refer it to the Attorney General for modification." *Id.* (emphasis added) (citing *Terhune v. Myers*, 338 Or 554, 558-59, 112 P3d 1188 (2005); *Kain v. Myers*, 333 Or 497, 502-03, 41 P3d 1076 (2002)). The caption for IP 69 is similarly underinclusive because it implies the initiative would eliminate a non-member's ability to receive union representation but leave the non-member obligated to pay the union. More than that, the caption implies that the initiative would eliminate a non-member's ability to receive compensation based on the union contract and leave the non-member without any protections.

However, as explained above, IP 69 does not simply provide that employers may not base non-member compensation on the union contract; the measure *requires* employers to base such compensation on "individual education, experience, training, skills, and performance." Section 9(5). The right to compensation based on 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"). 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 voters will likely mistakenly believe that non-members would be left with no protections regarding their compensation.[3] An initiative that proposes to remove existing protections and services for non-members without giving them any new rights in return will likely be seen by voters as unfair to non-members. Since the caption describes such an initiative, it casts IP 69 in a negative light and is slanted towards its defeat.

This Court should require modification, as it did in *Hunnicutt*, so the caption tells the whole story about whatever subject matter it identifies. Thus, if the caption identifies the changes to employee compensation, it should provide "Public employer must compensate non-union employee based on employee's individual merit, not on union contract," or something similarly balanced. If the caption describes the effects on union representation or non-member union dues, the following would comply with statutory standards: "Public employee unions not required to represent non-members; non-members not required to pay union dues."

---

[3] This was Petitioner's primary argument in her comments to the draft ballot title but Respondent did not respond to it in her Explanatory Letter. *See* Ex. 3 and 4.

2. The "Yes" Vote Result Statement Also Improperly Focuses on the Negatives for Non-members.

ORS 250.035(2) (b) requires a ballot title to contain a simple and understandable statement of not more than 25 words that describes the result if the measure is approved. The "yes" vote result statement suffers from the same deficiencies as the caption because it fails to state that non-members would have the new right of being compensated based on their education, experience, training, skills, and performance. This is a significant change to current law and voters must know what will happen if IP 69 passes. The "yes" statement tells voters that non-members will not be represented by the union and will not be compensated according to the union contract. The omission of the new right to be compensated according to merit makes it appear that non-members would be left defenseless and without any rights, which is simply incorrect. IP 69 gives unprecedented rights and control to non-members.

3. The Summary Fails to Mention the New Right to be Compensated Based on Merit.

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). It is inexcusable that the summary fails to inform voters that IP 69 would give non-members the new right to merit-based compensation. Clearly, this is of greater significance to voters than that the "Measure applies to new, renewed, or extended contracts entered into after the effective date of measure." The omission of this key component of IP 69 is so glaring it almost appears to be an inadvertent mistake. This new right is an actual major effect that should be identified in the caption, and at the very least should appear in the summary. As a chief petitioner who has spent considerable time and effort pursuing her constitutional right to initiate a law, and who is statutorily entitled to a reasonable and impartial ballot title, it will be very discouraging if this ballot title is certified as compliant.

## III. CONCLUSION

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

DATED this 15th day of January, 2016.

Respectfully submitted,

/s/ Jill Gibson
Jill Gibson, OSB #973581
GIBSON LAW FIRM, LLC

*Of Attorneys for Petitioner*

RECEIVED
2015 OCT 16 PM 2 41
SECRETARY OF STATE

# 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 includcd 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.**

**DRAFT BALLOT TITLE**

**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.

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.

Very truly yours,

Jill Gibson

ELLEN F. ROSENBLUM
Attorney General

FREDERICK M. BOSS
Deputy Attorney General

**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

Denise G. Fjordbeck
Attorney-in-Charge,
Civil/Administrative Appeals
denise.fjordbeck@doj.state.or.us

DGF:aft/7056252

Enclosure

Jill Gibson
2989 SW Montgomery Drive
Portland, OR 97201

Margaret Olney
Bennett Hartman Morris
210 SW Morrison St., Ste. 500
Portland, OR 97204

Steven C. Berman
Stoll Berne PC
209 SW Oak St., Ste. 500
Portland, OR 97204

Richard Schwarz
3411 NW Vaughn Street
Portland, OR 97210

**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.

## CERTIFICATE OF FILING

I hereby certify that I electronically filed the PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition 69) 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 am the chief petitioner of IP 69 and do not need to serve a chief petitioner. I further certify that I served the foregoing PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition 69) upon the following individuals on January 15, 2016, by delivering a true, full, and exact copy thereof via U.S. Mail to:

Attorney General
Office of the Solicitor General
400 Justice Building
1162 Court St., NE
Salem, OR 97301-4096

And upon the following individual on January 15, 2016, by submitting SEL 324:

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

DATED this 15th day of January, 2016.

GIBSON LAW FIRM, LLC

/s/ Jill Gibson

Jill Gibson, OSB # 973581
Of Attorneys for Petitioner