IN THE SUPREME COURT OF THE STATE OF OREGON

JILL GIBSON, Petitioner, v. ELLEN F. ROSENBLUM, Attorney General, State of Oregon Respondent.	Case No. PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL Initiative Petition 36 (2016)

BALLOT TITLE CERTIFIED
June 17, 2015
Initiative Petition 36
Chief Petitioner: Jill Gibson

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June 30, 2015

I. PETITION TO REVIEW BALLOT TITLE

Petitioner Jill Gibson is the author of IP 36, its chief petitioner, an elector of this State, a person dissatisfied with the ballot title for IP 36, and is adversely affected by Respondent's actions. Because Petitioner timely submitted written comments concerning the draft ballot title, she has standing to seek review pursuant to ORS 250.085(2).[1]

II. ARGUMENTS AND AUTHORITIES

A. Introduction

IP 36 would amend the Oregon Public Employee Collective Bargaining Act (PECBA), ORS 243.650–243.782, which allows public employees ("employees") to be represented by public employee unions ("unions"). Under PECBA, if employees form a union for the purpose of collective bargaining, then the union is the "exclusive representative" for all employees and employees are prohibited from presenting grievances to their employer without the intervention of the union or application of the collective bargaining agreement ("CBA"). ORS 243.650(8) (defining "exclusive representative), ORS 243.666(2) (grievance cannot be inconsistent with CBA and union must be given opportunity to be present at grievance adjustment). As such, currently employees have no right to opt out of a CBA and no right to represent themselves without the intervention of the union, which impinges upon their First Amendment rights of freedom of speech and association. *See Elvin* v. *Oregon Public Employees Union,* 313 Or 165, 168, 832 P2d 36 (1992) ("forcing a person - even a member of a collective bargaining unit - to be affiliated with and, to some extent, to thereby further the social and political views of a union has an impact on the person's right of free speech and

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[1] A copy of IP 36 is attached as Exhibit 1; the draft ballot title is attached as Exhibit 2; Petitioner's comments are attached as Exhibit 3; Respondent's explanatory letter is attached as Exhibit 4; and the certified ballot title is attached as Exhibit 5.

association").

IP 36 would protect employees' First Amendment rights by giving them the right to represent themselves and bargain individually rather than collectively. Employees who choose to be represented by and join the union would be "union public employees" and employees who choose to represent themselves and not join the union would be "independent public employees." Section 4(11) and (24). To reinforce this right of self-representation, IP 36 would prohibit unions from representing independent public employees ("nonmembers") and charging them for representation. Sections 4(1) and 6(1), (5) and (6). Finally, employers would be prohibited from imposing discriminatory employment terms upon a nonmember and must base such employment terms upon a nonmember's education, experience, training, skills, and performance, rather than a CBA. Sections 3(2) and 7(c).

B. Certified Ballot Title

Respondent has incorrectly concluded that IP 36 would allow "free riders." This conclusion is contrary to controlling case law and the plain language of the initiative. The ballot title closely tracks IP 9's ballot title and, except for one sentence in the summary, is identical to IP 35's ballot title. IP 36 and IP 9 are fundamentally different because IP 36 explicitly prohibits union representation of nonmembers, unlike IP 9 which required union representation of nonmembers. Additionally, IP 36 and IP 35 are different in the following ways: 1) IP 36 *prohibits* union representation of nonmembers, IP 35 only does "not require" such representation; 2) IP 36 explicitly establishes the right of self-representation for nonmembers; and 3) IP 36 requires employers to base nonmember employment terms upon a nonmember's education, experience, training, skills, and performance. IP 36 and IP 35 have different subjects, purposes, and major effects; therefore, Respondent should not provide identical ballot titles pursuant to ORS 250.062. In spite of these differences, IP 36 and IP

35 are similar in that they both eliminate "free riders," which were allowed in IP 9; however, they accomplish this in different ways. IP 36 eliminates "free riders" by explicitly prohibiting unions from representing nonmembers and IP 35 eliminates "free riders" by excluding nonmembers from collective bargaining and bargaining units. Petitioner objects to all portions of the ballot title because they do not comply with ORS 250.035(2)(a)-(d) and urges this Court to require modification of the ballot title as suggested by Petitioner in her comments, which are incorporated by reference. *See* Exhibit 3.

C. Respondent's Conclusion that IP 36 Allows "Free Riders" is Incorrect

1. Respondent disregards controlling case law. This Court has already reviewed an initiative that relieved unions of their duty to represent nonmembers and a "free rider" effect was not included in the ballot title. In *Caruthers v. Myers*, 344 Or 596, 189 P3d 1 (2008), the initiative (IP 27) provided, "No employee shall be required to pay dues or other monies to a union and no union shall be required to represent or bargain for an employee who chooses not to be a member of the union," and the caption was ultimately modified to state, "Prohibits requiring employees to share union representation costs; changes public employee union obligations to nonmembers." Because the *Caruthers* initiative relieved unions of their duty to represent nonmembers, "free riders" were not allowed and such effect was not identified in the ballot title. IP 36 goes even further than the *Caruthers* initiative (and IP 35) and *prohibits* union representation of nonmembers.

Although the *Caruther*'s initiative clearly did not allow "free riders," its effect on a union's representation obligation to nonmembers was less clear because the initiative did not expressly amend existing law. *See Caruthers* at 602 ("The interpretative issue posed by the proposed measure is the extent to which the proposed measure, if adopted, would alter existing state law

governing the relations between public sector unions and the workers they represent."). This ambiguity is not present in the instant case because IP 36 clearly alters "existing state law governing the relations between public sector unions and the workers they represent." IP 36 is eight pages long, expressly amends PECBA (showing deletions and insertions to ORS 243.650 - 243.672), and expressly prohibits union representation of nonmembers. Respondent has ignored the plain text of IP 36 and its explicit amendments to current law in determining that nonmembers would be "free riders" and that it is "unclear" whether IP 36 allows nonmembers to represent themselves.

2. Respondent has inappropriately interpreted the legal effect of IP 36. Respondent's conclusion that IP 36 allows "free riders" is unsupported by any case law or statutes on point. Rather this is the *argument* of opponents to IP 36 and Respondent has adopted their argument. These opponents repeatedly compare IP 36 to IP 9; however, IP 9 was fundamentally different because it did not prohibit unions from representing nonmembers. Petitioner vehemently disputes the argument that IP 36 would allow "free riders" and it is well settled that Respondent may not adopt a disputed interpretation of a measure. *See, e.g., Crumpton v. Kulongoski*, 321 Or 269, 276, 896 P2d 577 ("This court has avoided taking sides in [] controversies over interpretation of a measure's ambiguous words by requiring use of the words of the measure, or a close paraphrase of those words, in the ballot title.). When there are two or more plausible interpretations of a proposed initiative this Court declines to choose, and does not allow the Attorney General to choose, one of those interpretations for purposes of the ballot title. *Id.* at 602-3. *See also Kouns v. Paulus*, 296 Or 826, 828, 680 P2d 385 (1984) (it is not the Attorney General's function to interpret a proposed measure in preparing a ballot title). Respondent's interpretation of IP 36 clearly is beyond the scope of this ballot title process.

3. Respondent's legal interpretation of IP 36 is flawed and unsupported. Even if Respondent were allowed to choose between the competing interpretations of IP 36, the interpretation she chose is unsupported. Respondent reaches her conclusion because she believes "If a public employer were to refuse to allow that non-union public employee terms at least as favorable as the union-bargained terms, the "natural and probable effect" of that refusal is that the public employer would violate ORS 243.672(l)(a) by interfering with or coercing that employee with respect to the protected decision whether to join a union." Exhibit 4 at p. 4. A deconstruction of this argument reveals its fallacy, as set forth below.

a. Respondent has incorrectly determined that IP 36 does not amend current law regarding union obligations. Respondent's conclusion that IP 36 allows "free riders" is based on the incorrect belief that IP 36 does not amend ORS 243.762, which establishes unfair labor practices. Exhibit 4 at p. 4. However, IP 36 does amend ORS 243.762 by operation of ORS 243.672(f), which provides that it is an unfair labor practice to fail to comply with any provision of ORS 243.650 to 243.782. Section 2 of IP 36 provides that the initiative would become part of ORS 243.650 – 243.782. As a result, it would be an unfair labor practice to violate ORS 243.650 – 243.782 *as amended by IP 36*, and an employer would commit an unfair labor practice if it represented a nonmember. *See, e.g.*, Section 6(5) (union has authority to represent an employee only upon receipt of the employee's annual written notice that the employee chooses to join union). In other words, if passed, Section 6(5) of IP 36 would become ORS 243.666(5), and a violation of ORS 243.666(5) would be an unfair labor practice under ORS 243.672(f). IP 36's express prohibition of union representation of nonmembers amends and eliminates the current obligation of unions to represent nonmembers. Any remaining implicit union obligation towards nonmembers is overridden by the

express language of IP 36.

b. Respondent has incorrectly determined that employers who offer different employment terms to nonmembers would violate ORS 243.672(1)(a). Even if unions were not expressly prohibited from representing nonmembers, employers would not be "coercing" nonmembers by offering them different employment terms. ORS 243.672(1)(a) provides it is an unfair labor practice to "interfere with, restrain, or coerce employees in or because of the exercise of rights guarantees in ORS 243.662."[2] If IP 36 passed and nonmembers were no longer represented by unions, employers would set nonmember employment terms according to Section 3(2), which requires "fair compensation and fair benefits based upon the employee's education, experience, training, skills, and performance." Respondent assumes that employers would establish arbitrary and discriminatory terms of employment; however, this would be an unfair labor practice under IP 36. In addition to general laws that protect employees from discrimination and the State Personnel Relations Law, ORS Chapter 240, IP 36 specifically protects nonmembers from discriminatory employment conditions. Section 7(1)(c). However, this does not mean employers would have to offer members and nonmembers the same employment terms.

Employment terms based on the criteria established by IP 36 would not be coercive or discriminatory under ORS 243.671(1)(a) or (c) because the terms would be based on legitimate, nondiscriminatory reasons, and not based upon protected collective bargaining activities. *See Portland Ass'n Teachers v. Multnomah Sch. Dist. No. 1,* 171 Or App 616, 623, 16 P3d 1189 (2000) (complainant must show that the employer was motivated to act based on the employee's union activity); *Norris v. Oregon State Police Dep't,* 3 PECBR

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

1994, 2002 (1978) (there is no violation as long as the employer shows that its actions are unconnected to union activity). Nonmembers would not be participating in union activity; therefore, it could not be a basis for the employment terms.

Respondent also incorrectly applied the "natural and probable effect" test for finding a violation because she used a subjective test. *See* Exhibit 4 at p. 4. However, the subjective impressions of employees are not controlling and determinations are based on an objective standard and the totality of the circumstances. *AFSCME Local 88 v. Multnomah County,* 18 PECBR 430, 437 (2000). Moreover, even if Respondent used the correct standard, no violation could be found because individual employee complaints that do not involve participation in union activities are not covered by ORS 243.672(1)(a). *See, e.g., Eugene Charter School Professionals, AFT, AFL-CIO v. Ridgeline Montessori Public Charter School,* ERB Case No. UP-34-08, at 13, 23 PECBR 316, 328 (Sept 15, 2009) ("Protected activity does not include strictly individual complaints about working conditions . . . that are unrelated to the activities of a labor organization."); *Lane County Public Works Ass'n v. Lane County,* 13 PECBR 187, 200 (1991), *aff'd,* 118 Or App 46 (1993) (pursuing a personal interest, such as a promotion or pay increase, outside the context of bargaining is not protected). In the "free rider" hypothetical Respondent lays out, a nonmember would have to claim that if he or she did not receive the same employment terms as members, then the nonmember would be coerced to join the union in order to get the same employment terms. These hypothetical complaints necessarily would be individually pursued and the nonmember would not have been participating in protected collective bargaining activity. Respondent cites to *Oregon Nurses Association v. Oregon Health & Science University*, 19 PECBRA 590 (2002), which is irrelevant because in that case unions were not prohibited from representing nonmembers, which under IP 36

would be an unfair labor practice.

Finally, assuming *arguendo* that the above elements of a violation could exist, the final element of a causal connection could not be established between protected union activity and employer action. The Employment Relations Board will not find a violation if an employer proves that its action was taken for good cause and for legitimate, nondiscriminatory reasons. *Oregon Ass'n of Justice Attorneys v. Dep't of Justice,* 17 PECBR 102, 135 (1997); *Teamsters, Local 670 v. Rural Road Assessment Dist. #3,* 8 PECBR 6580, 6584 (1984). As supported by considerable case law, an employer who bases nonmember employment terms upon objective criteria such as performance, skills, and experience, as required by IP 36, will not be coercing nonmembers in violation of ORS 243.672(1)(a).[3] As a result, under IP 36 employers will not be required to give nonmembers the same employment terms as members and there is no "free rider" effect.

D. The Ballot Title Should Be Modified

Petitioner respectfully requests this Court to require Respondent to modify the ballot title to identify IP 36's major effects: (1) establishing the right of self-representation for employees and (2) prohibiting discrimination of employees who choose to exercise their right of self-representation. Petitioner suggests the following ballot title:

Allows public employees choosing to not join union to represent themselves; prohibits discrimination of non-members

Or

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

Prohibits public employee unions from representing and charging non-union members who choose to represent themselves

Result of "Yes" Vote: "Yes" vote allows public employees choosing not to join union to represent themselves; prohibits unions from representing non-members; prohibits discriminatory employment conditions for non-members.

Result of "No" Vote: "No" vote retains prohibition of self-representation for public employees choosing to not join union; requires unions to represent non-members; allows required payments from non-members.

Summary: Current law allows public employees to bargain collectively through a labor organization/union as their exclusive representative; does not require union membership as a condition of public employment; requires union to fairly represent both members and non-members in bargaining unit; allows collective bargaining agreements requiring non-members public employees who choose not to join union to share the costs of the legally required union representation. Measure affirms public employees' right to join or not join union; measure prohibits union from representing non-members; allows non-member public employees who choose to not join the union to bargain individually regarding salary, benefits, other terms of employment,; prohibits employers from giving non-members discriminatory less favorable employment terms; requires union members to renew membership annually. Measure applies to new, renewed, or extended contracts entered into after the effective date of the measure. Other provisions.

III. CONCLUSION

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

DATED this 30th day of June, 2015.

Respectfully submitted,

/s/ Jill Gibson
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Of Attorneys for Petitioner

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

SECTION 1. The people of Oregon find that:

(1) A person shall have freedom of speech regarding their employment.

(2) A person shall have freedom of association regarding their employment.

(3) A person shall have the right to communicate with their employer regarding the terms and conditions of their employment.

(4) A person who exercises their right to represent themselves regarding their employment conditions shall be protected from workplace discrimination.

SECTION 2. Sections 3 and 8 of this 2016 Act are added to and made part of ORS 243.650 to 243.782.

SECTION 3. (1) Independent Public Employees, as defined in ORS 243.650 (11), have freedom of speech regarding the terms and conditions of their employment. Independent Public Employees may represent themselves regarding their salary, benefits, hours, sick leave, vacation, and other terms of employment with their employer or their employer's representative without the intervention of a labor organization.

(2) Independent Public Employees are entitled to fair compensation and fair benefits based upon the employee's education, experience, training, skills, and performance.

(3) Public Employers are prohibited from discriminating against Independent Public Employees who exercise their right to represent themselves.

SECTION 4. ORS 243.650 is amended to read:

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

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

(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 the **Union Public Employees** [*employees*] in the appropriate bargaining unit.

(4) "Collective bargaining" means the performance of the mutual obligation of a public employer and the representative of its **Union Public Employees** [*employees*] 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 **Union Public Employees** [*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 from discussing or executing written agreements regarding matters other than mandatory subjects of bargaining that are not prohibited by law as long as there is mutual agreement of the parties to discuss these matters, which are permissive subjects of bargaining.

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

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

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

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

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

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

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

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

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

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

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

[*(10) "Fair-share agreement" means an agreement between the public employer and the recognized or certified bargaining representative of public employees whereby employees who are not members of the employee organization are required to make an in-lieu-of-dues payment to an employee organization except as provided in ORS 243.666. Upon the filing with the board of a petition by 30 percent or more of the employees in an appropriate bargaining unit covered by such union security agreement declaring they desire that the agreement be rescinded, the board shall take a secret ballot of the employees in the unit and certify the results thereof to the recognized or certified bargaining representative and to the public employer. Unless a majority of the votes cast in an election favor the union security agreement, the board shall certify deauthorization of the agreement. A petition for deauthorization of a union security agreement must be filed not more than 90 calendar days after the collective bargaining agreement is executed. Only one such election may be conducted in any appropriate bargaining unit during the term of a collective bargaining agreement between a public employer and the recognized or certified bargaining representative.*]

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

(11) "Independent Public Employee" means a public employee who has not chosen to join or annually renew membership in a labor organization.

(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.

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

(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.

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

(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.

(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.]

(18) [*(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.

(19) [*(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.

(20) [*(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.

(21) [*(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.

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

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

(24) "Union Public Employee" means a public employee, in a collective bargaining unit represented by a labor organization, who has chosen to join and annually renew membership in the labor organization.

(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 5. ORS 243.656 is amended to read:

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

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

(2) Recognition by public employers of the right of public employees to organize and full acceptance of the principle and procedure of collective negotiation between public employers and public employee organizations can alleviate various forms of strife and unrest. Experience in

the private and public sectors of our economy has proved that unresolved disputes in the public service are injurious to the public, the governmental agencies, and public employees;

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

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

(5) It is the purpose of ORS 243.650 to 243.782 to **protect public employees' rights of freedom of speech and freedom of association regarding employment relations. It is also the purpose of ORS 243.650 to 243.782 to prohibit discrimination against public employees who choose to represent themselves in employment relations. It is also the purpose of ORS 243.650 to 243.782** to obligate public employers, public employees **who wish to be represented by 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 6. ORS 243.666 is amended to read:

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

(2) Notwithstanding the provisions of subsection (1) of this section, an individual **Union Public Employee** [*employee*] 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 **Union Public Employees** [*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.

(4) An exclusive representative shall provide all public employees in the appropriate bargaining unit with an annual written notice that:

(a) accurately, fairly, and concisely describes the rights of Independent Public Employees and Union Public Employees;

(b) advises that Independent Public Employees are protected from workplace discrimination; and

(c) provides on the first page of the notice a clearly marked space for public employees to indicate in writing their choice to be an Independent Public Employee or Union Public Employee.

(5) An exclusive representative has authority to represent a public employee only upon receipt of the employee's annual written notice that the employee chooses to join or annually renew membership in a labor organization and be a Union Public Employee.

(6) An exclusive representative may receive dues and fees from Union Public Employees. An exclusive representative may not request, receive, charge, or collect dues, fees, or other payments from Independent Public Employees.

SECTION 7. ORS 243.672 is amended to read:

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

(a) Interfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662.

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

(c) Discriminate in regard to hiring, tenure or any terms or condition of employment for the purpose of encouraging or discouraging membership in an employee organization. **Imposing discriminatory terms or conditions of employment upon Independent Public Employees is prohibited.** [*Nothing in this section is intended to prohibit the entering into of a fair-share agreement between a public employer and the exclusive bargaining representative of its employees. If a "fair-share" agreement has been agreed to by the public employer and exclusive representative, nothing prohibits the deduction of the payment-in-lieu-of-dues from the salaries or wages of the employees.*]

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

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

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

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

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

(i) Violate ORS 243.670 (2).

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

(a) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under ORS 243.650 to 243.782.

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

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

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

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

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

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

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

SECTION 8. Public Employers have no greater or lesser obligations to negotiate with Independent Public Employees, as defined in ORS 243.650 (11), than those obligations public employers owe to public employees in a unit without an exclusive bargaining representative.

SECTION 9. The Independent Public Employee Protection 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

Prohibits public employee unions from representing non-union members or requiring non-members to pay representation costs

Result of "Yes" Vote: "Yes" vote prohibits public employee union from representing non-members, requiring contributions from non-members; prohibits less favorable employment terms for non-members. Union membership requires annual renewal.

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

Summary: Current law allows public employees to bargain collectively through a labor organization/union of their choosing as their exclusive representative; prohibits requiring union membership as a condition of public employment; requires union to fairly represent both members and non-members in bargaining unit; allows collective bargaining agreements requiring public employees who choose not to join union to share the costs of the legally required union representation. Measure prohibits union from representing non-members; allows non-member public employees to bargain individually regarding salary, benefits, other terms of employment, prohibits employers from giving non-members less favorable employment terms; requires union members to renew membership annually. Measure applies to new, renewed, or extended contracts entered into after the effective date of the measure. Other provisions.

GIBSON
LAW FIRM

June 2, 2015

VIA FACSIMILE - (503) 373-7414

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 36 (2016)

Dear Secretary Atkins,

I am the Chief Petitioner of IP 36 and an elector in the State of Oregon. Thank you for the opportunity to provide comments on the draft ballot title.

I. INTRODUCTION

IP 36 proposes to amend the Oregon Public Employee Collective Bargaining Act (PECBA), found at ORS 243.650 *et seq*. Currently, PECBA prohibits public employees in a collective bargaining unit from representing themselves with respect to employment relations. *See* ORS 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 for the purposes of collective bargaining with respect to employment relations.") (emphasis added). As such, public employees who work at a unionized worksite may not bargain individually regarding their salary, benefits, hours, vacations, and sick leave. *See* ORS 243.650 (7)(a) (defining "employment relations"). Such employees also are prohibited from presenting grievances to their employer unless the union has first been given the opportunity to be involved and the employee's request is consistent with the bargaining agreement. ORS 243.666(2). If a public employee works at a unionized worksite, the employee's salary and benefits are not specifically based upon their education, experience, training, skills, and performance; rather, the employee's employment terms are based upon the collective bargaining agreement.

IP 36 would amend the laws regarding employment representation and allow individual bargaining by "Independent Public Employees," defined by the measure as public employees who have chosen to not join a union. An employee who chooses to be an Independent Public Employee would have the right to represent themselves regarding their employment terms, including salary, benefits, hours, and vacation time. Independent Public Employee would also have the right to present grievances directly to their employer without the intervention of a union.

EXHIBIT 3
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IP 36 would require unions to provide public employees a notice of rights annually to inform employees of their right to choose between self-representation and union-representation. To protect the right of self-representation, unions would not be allowed to represent or assess public employees who have chosen to bargain on their own behalf. To further protect employees who choose to be independent of the union and exercise their right of self-representation, employers would be prohibited from imposing discriminatory terms of employment on such employees.

II. DRAFT BALLOT TITLE

The Attorney General has proposed the following ballot title for IP 36:

Prohibits public employee unions from representing non-union members or requiring non-members to pay representation costs

Result of "Yes" Vote: "Yes" vote prohibits public employee union from representing non-members, requiring contributions from non-members; prohibits less favorable employment terms for non-members. Union membership requires annual renewal.

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

Summary: Current law allows public employees to bargain collectively through a labor organization/union of their choosing as their exclusive representative; prohibits requiring union membership as a condition of public employment; requires union to fairly represent both members and non-members in bargaining unit; allows collective bargaining agreements requiring public employees who choose not to join union to share the costs of the legally required union representation. Measure prohibits union from representing non-members; allows non-member public employees to bargain individually regarding salary, benefits, other terms of employment, prohibits employers from giving non-members less favorable employment terms; requires union members to 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

IP 36 has two major effects: (1) it gives public employees the right of self-representation and (2) it prohibits employers from discriminating against employees who choose to exercise their right of self-representation. IP 36, Section 3(1) and (3); Section 7(1)(c). However, the right of self-representation is not described in the caption or the result statements, and the prohibition of discrimination is not accurately described in any section of the ballot title. The measure, if passed, will give unprecedented individual rights to public employees, yet the ballot title focuses on the prohibitions placed upon unions, which results in an unfair, inaccurate, and underinclusive

description of IP 36. Emphasizing these union prohibitions while overlooking the employee rights created puts the measure in a negative light and appears to be a statement in opposition to the measure.

A. The Caption

ORS 250.035(2)(a) requires a ballot title to contain "[a] caption of not more than 15 words that reasonably identifies the subject matter of the state measure." The "subject matter" of a measure 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 P.3d 1194 (2011) (citation omitted). When the Attorney General chooses to describe a measure by listing the changes that the proposed measure would enact, some changes may be of "sufficient significance" that they must be included in the description. *See Brady/Berman v. Kroger*, 347 Or 518, 523, 225 P.3d 36 (2009) (so concluding); *see also Greenberg v. Myers*, 340 Or 65, 69, 127 P.3d 1192 (2006) ("What the Attorney General cannot do is select and identify in a caption only one out of multiple subjects and thus understate the scope of the proposed measure's subject matter."). Similarly, a caption that is underinclusive, because it fails to inform voters of all the major effects of an initiative, is statutorily noncompliant. *Towers v. Myers*, 341 Or 357, 362 (2006).

The draft caption is underinclusive because it does not identify a major effect of the measure: public employees' right of self-representation. This unprecedented right would be a significant change in Oregon's collective bargaining laws and is the primary subject matter of the measure. Furthermore, the failure to identify this right when stating that unions are prohibited from representing nonmembers creates the false impression that nonmembers will not be represented at all. The caption states that the measure "Prohibits public employee unions from representing non-union members," and failing to state that such members have the right to represent themselves leaves voters with an inaccurate impression of the measure's effects. The caption only tells voters that unions are prohibited from giving or charging for nonmember representation, and voters are not told that nonmembers are authorized to represent themselves. Thus, the caption inaccurately and unfairly describes the measure as leaving nonmembers unrepresented.

The caption is also unclear because in one instance public employees who choose to represent themselves are referred to as "non-union members" and then referred to as "non-members." The word "non-member" should be used in every instance so potential signers and voters understand to whom the ballot title is referring.

To address these insufficiencies, I propose the following caption:

Allows public employees choosing to not join union to represent themselves; prohibits discrimination of non-members

Or

Prohibits public employee unions from representing and charging non-union members who choose to represent themselves

B. The Result of "Yes" Vote Statement

ORS 250.035(2)(b) requires that a ballot title 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 most significant and immediate effect of IP 36 is that union nonmembers would be allowed to represent themselves and negotiate their salary and hours directly with their employer, which is currently prohibited under PECBA. However, like the caption, the "yes" vote statement omits this significant effect and instead focuses on the prohibition of unions to represent nonmembers. Again, like the caption, this will likely result in potential signers and voters mistakenly believing that nonmembers will be unrepresented. Instead of certain employees being left unrepresented, the measure actually gives employees the choice of being self-represented or union-represented. The "yes" statement does not describe this unprecedented right that would result from passage of the measure; rather, the statement inaccurately implies that certain public employees would be denied rights and representation.

The "yes" vote result statement also inappropriately uses the word "contributions" in the phrase "requiring contributions from non-members." For the general public, the word "contribution" implies that a payment is being given voluntarily or as a gift. But payments by nonmembers for representation costs are *required* when agreed to by unions and employers. The word "contribution" does not appear in PECBA; instead, these required payments are referred to as "payments," "assessments," or "payment-in-lieu-of-dues." *See* ORS 243.650(10) and (18); ORS 243.672(1)(c). Because "contribution" is misleading and has no basis in law, it should be removed from the ballot title.

Finally, the statement incorrectly states that the measure prohibits "less favorable" employment terms. The measure actually prohibits *discriminatory* employment terms[1], which is different than "less favorable" terms. For example, a new employee who receives a lower salary than a senior employee obviously has a "less favorable" salary, but this is not necessarily discriminatory. In fact, a lower salary may be completely fair given a new employee's

[1] Current law only prohibits discrimination that is for the purpose of encouraging or discouraging union membership. ORS 243.672(1)(c). IP 36 expands this protection and would prohibit discrimination for any purpose.

"experience, training, sills, and performance." IP 36, Section 3(2). The measure would not prohibit an employer from giving a nonmember a salary that is less than a union member's salary as long as the nonmember's salary is fair and not discriminatory; however, this is the result that the "yes" statement implies. Additionally, the ballot title should use the word "discriminatory" because that is the language of the measure. *See, e.g., Sampson v. Roberts*, 309 Or 335, 340, 788 P2d 421 (1990) (absent a compelling reason to the contrary, Attorney General should use the actual language of the measure).

Please consider the following "yes" vote result statement:

Result of "Yes" Vote: "Yes" vote allows public employees choosing not to join union to represent themselves; prohibits unions from representing non-members; prohibits discriminatory employment conditions for non-members.

C. The Result of "No' Vote Statement

ORS 250.035(2)(c) requires that a ballot title 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).

Although it is correct that if the measure failed public employee unions and public employers would retain the authority to require nonmembers to pay payments-in-lieu-of-dues, this is not a major effect of IP 36. The measure's primary subject matter is self-representation of nonmembers, and if the measure failed nonmembers would continue to be prohibited from negotiating their employment conditions and presenting grievances to their employer without the intervention of unions. The current "no" vote result statement implies that the measure's major effect is to prohibit union security agreements. However, IP 36's major effect is to allow nonmember self-representation, and prohibiting the collection of payments for services not rendered is a subsidiary effect of the right to self-representation.

To explain the status quo of the subject matter of the proposed measure, please consider the following:

Result of "No" Vote: "No" vote retains prohibition of self-representation for public employees choosing to not join union; requires unions to represent non-members; allows required payments from non-members.

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 adequately describes several proposed changes of IP 36; however, it does not accurately and fairly describe certain aspects of current law and the measure. For convenience, I have underlined the language I find noncompliant in the Attorney General's draft summary:

Summary: Current law allows public employees to bargain collectively through a labor organization/union of their choosing as their exclusive representative; prohibits requiring union membership as a condition of public employment; requires union to fairly represent both members and non-members in bargaining unit; allows collective bargaining agreements requiring public employees who choose not to join union to share the costs of the legally required union representation. Measure prohibits union from representing non-members; allows non-member public employees to bargain individually regarding salary, benefits, other terms of employment, prohibits employers from giving non-members less favorable employment terms; requires union members to renew membership annually. Measure applies to new, renewed, or extended contracts entered into after the effective date of the measure. Other provisions.

The first sentence of the summary is misleading because it incorrectly implies that that public employees may choose to be represented by any union they want; however, public employees may only be represented by the union that has already been certified to be their "exclusive representative." ORS 243.650(8) provides that an "exclusive representative" is "the labor organization that, as a result of certification by the board or recognition by the employer, has the right to be the collective bargaining agent of *all employees* in an appropriate bargaining unit." *Id.* (emphasis added). Similarly, "A labor organization certified by the Employment Relations Board or recognized by the public employer is the *exclusive* representative of the employees of a public employer for the purposes of collective bargaining with respect to employment relations." ORS 243.666(1) (emphasis added). Therefore, after an exclusive representative has been certified to represent a bargaining unit, all public employees in that bargaining unit must be represented by that exclusive representative, and employees may not choose to be represented by another union.

The phrase "of their own choosing" does appear in ORS 243.662, but that describes the process of initially forming a union. This statute, and the challenged phrase, does not mean that all public employee may choose which union bargains on their behalf. Even at the formation stage, not all employees will receive the representative of their choice since the majority rules.

It is important to note that the certified summary for another measure pertaining to collective bargaining (IP 9 (2014)) did not use this misleading phrase when describing current law. In fact, the first sentence of IP 36's summary is verbatim the first sentence of IP 9's summary, except for the challenged phrase. Because the phrase will likely cause potential signers and voters to have an incorrect understanding of current law, the sentence should be the same as it appeared in the court-approved ballot title for IP 9: "Current law allows public employees to bargain collectively through a labor organization/union as their exclusive representative;".

Current statutes do not use the words "public employees who choose not to join union" when describing nonmembers[2]; however, the summary takes this phrase from the measure and uses it to describe nonmembers under current law. Conversely, the summary refers to the same type of employees simply as "non-members" when describing the measure. The summary twice describes current law as allowing "choosing," but does not once use that word to describe the effects of the measure, which would give public employees more choices than they currently have. Summarizing current law and the measure in this fashion is not impartial and it inaccurately suggests that public employees would lose rights and choices if IP 36 passed. To correct this insufficiency and imbalance, the summary should describe "non-members" as "public employees who choose not to join union" at least once when describing the measure, such as, "Allows public employees who choose not to join union to bargain individually regarding salary, benefits, other terms of employment." (This phrase should be followed by a semi-colon rather than the comma which exists in the draft summary.)

To compound this insufficiency, the draft summary removes a sentence that was included in IP 9's summary to describe an aspect of the measure that also exists in IP 36. It is important to include the sentence stating, "Measure affirms public employee's right to join or not join union" in IP 36's summary because the summary states that current law "prohibits requiring union membership as a condition of public employment." Removing the sentence could cause potential signers and voters to mistakenly believe that current law prohibits required union membership but IP 36 does *not* prohibit required membership. This element of current law would not change and mentioning it could cause confusion on this issue. Since required union membership is not a subject matter of the measure and is not affected by the measure it is unclear why the summary addresses this issue when summarizing the measure. It appears to be an endorsement of current law, especially when the summary does not clarify that the same is true of the measure. If current law will be described thusly, it is unfair to not state that the measure affirms the right to join or not join a union.

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

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

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

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

Finally, I object to the phrase "less favorable" to describe "discriminatory." As stated earlier, the measure prohibits discriminatory employment conditions for nonmembers; it does not prohibit "less favorable" terms. The two descriptions are not synonymous and "less favorable" terms are not necessarily discriminatory. If the measure passes an employer would be allowed to impose less favorable terms upon nonmembers when such terms are fair based on the employee's education, experience, training, skills, and performance. IP 36, Section 3(2).

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

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

Summary: Current law allows public employees to bargain collectively through a labor organization/union ~~of their choosing~~ as their exclusive representative; prohibits requiring union membership as a condition of public employment; requires union to ~~fairly~~ represent both members and non-members in bargaining unit; allows collective bargaining agreements requiring **non-members** ~~public employees who choose not to join union~~ to share the costs of the legally required union representation. **Measure affirms public employees' right to join or not join union**; measure prohibits union from representing non-members; allows ~~non-member~~ public employees **who choose to not join the union** to bargain individually regarding salary, benefits, other terms of employment~~;~~; prohibits employers from giving non-members **discriminatory** ~~less favorable~~ employment terms; requires union members to renew membership annually. Measure applies to new, renewed, or extended contracts entered into after the effective date of ~~the~~ measure. Other provisions.

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

Very truly yours,

Jill Gibson

ELLEN F. ROSENBLUM
Attorney General

FREDERICK M. BOSS
Deputy Attorney General

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

June 17, 2015

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

Re: Proposed Initiative Petition — Non-Union Public Employees May Benefit from Union Bargaining Without Sharing Representation Costs; Modifies Representation Obligations
DOJ File #BT-36-15; Elections Division #2016-036

Dear Mr. Williams:

We received comments on the Attorney General's draft ballot title for Initiative Petition 36 (2016) (IP 36) from chief petitioner Jill Gibson, Eric Winters, Hanna Vaandering and BethAnne Darby (through counsel, Margaret Olney), Heather Conroy (through counsel, Steven Berman), and Richard Schwarz. Each commenter objects to all parts of the draft ballot title. In this letter, we discuss why we made or did not make changes to each part of the ballot title in light of the submitted comments.

A. The caption

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

Prohibits public employees unions from representing non-union members or requiring non-members to pay representation costs

We address the comments and objections below.

1. Comments from Ms. Gibson

Ms. Gibson objects to the draft caption in three respects. First, she argues that the caption is underinclusive because it fails to identify a major effect of the measure, allowing "public employees' right of self-representation." (Gibson Letter, 3). She contends that this change is an "unprecedented right" that is a "significant change in Oregon's collective

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bargaining laws and is the primary subject matter of the measure." (*Id.*). Second, she argues that the caption is misleading because it only tells voters that "unions are prohibited from giving or charging for nonmember representation" and fails to inform them that non-members are authorized to represent themselves (and are not left "unrepresented.") (*Id.*). Third, she contends that the caption is "unclear" because the caption refers to public employees who choose to represent themselves as "non-union members" and then later referred to as "non-members." (*Id.*). She recommends that the caption should read: "Allows public employees choosing to not join union to represent themselves; prohibits discrimination of non-members". (*Id.*).

2. Comments from Mr. Winters

Mr. Winters objects to the draft caption in one respect. He contends that the subject matter of the proposed measure is to allow non-union public employees from negotiating their own employment terms, which he asserts is prohibited under the Public Employee Collective Bargaining Act, (PEBCA), ORS 243.650 to ORS 243.782. (Winters Letter, 1). He suggests that the caption could read: "Permits public employees who do not join union to represent themselves without paying the union" or "Permits 'Independent Public Employees' (defined) to negotiate employment terms without union intervention or required payments" or "Prevents public employee unions from representing non-member 'Independent Public Employees' and charging them for services." (*Id.*).

3. Comments from Ms. Vaandering and Ms. Darby

Ms. Vaandering and Ms. Darby contend that the draft caption is deficient in two respects. First, Ms. Vaandering and Ms. Darby contend that IP 36 will "allow employees choosing not to join the union to receive the benefits of that representation without cost" and the draft caption fails to identify that "free-rider" effect. (Olney Letter, 9). They argue that the caption must identify the free-rider effect like other ballot titles concerning similar initiative measures. (*Id.*). They propose that the caption should read: "Allows non-union member public employees to receive union benefits while refusing bargaining costs; modifies representation obligations." (Olney Letter, 9-10); *see Novick/Bosak v. Myers*, 333 Or 18, 26, 36 P3d 464 (2001) (requiring ballot title for IP 39 (2002) to identify free-rider effect); *Sizemore/Terhune*, 342 Or 578, 588-89, 157 P3d 188 (2007) (requiring ballot title for IP 48 (2008) to identify free-rider effect); *Towers v. Rosenblum*, 354 Or 125, 131, 310 P3d 136 (2013) (requiring caption for IP 9 (2014) to identify free-rider effect). Second, they argue that the phrase "prohibits public employee unions from representing non-union members" is inaccurate and misleading because that effect is not clear in light of ORS 243.672(2)(a), which IP 36 does not modify. (Olney Letter, 10). Relying on *Caruthers v. Myers*, 344 Or 596, 602, 189 P3d 1 (2008), they suggest that the "only clear thing the caption (and remainder of ballot title) can tell voters is that the proposal 'changes' the union's bargaining obligations." (*Id.* at 10-11). They suggest that the caption should read: "Allows non-union public employees to receive union benefits while refusing bargaining costs; modifies representation obligations". (*Id.* at 11).

4. Comments from Ms. Conroy

Ms. Conroy raises three objections to the draft caption. First, she objects that the caption fails to identify a free-rider effect of IP 36. (Berman Letter, 4). Second, she argues that the phrase "[p]rohibits public employee unions from representing non-members" is inaccurate and misleading. (Berman Letter). She contends that IP 36's "impact on a union's obligation to represent non-members is unclear" in light of ORS 243.672, which prohibits public employers from disparate treatment of non-union public employees. She argues that that provision gives non-members the ability to "gain from the negotiating activities of public employees unions [without being required to pay for the costs of those negotiating activities]." (Berman Letter, 5). She suggests that, at most, IP 36 would "change" or "modify" some union representation obligations. (*Id.* at 4-5). Third, she argues that the phrase "[p]rohibits public employee unions from representing non-members" is misleading concerning current law because public employee unions are not required to represent non-members that are not a part of the bargaining unit for which the public employee union is the exclusive bargaining representative. (*Id.* at 5). Fourth, she argues that that phrase would leave an erroneous impression "that public employees have no choice *but* to be represented by public employee unions in all situations." (*Id.*).

5. Comments from Mr. Schwarz

Mr. Schwarz argues that the caption is "grossly flawed" and "does not accurately capture the effect of IP 36, and mischaracterizes the plain text." (Schwarz Letter, 5). He also contends that an effect of IP 36 is to create a free-rider effect, in that because of the unaltered anti-discrimination provisions of PECBA, "public employees exercising the right for 'independent' status will continue to enjoy the terms and conditions of the contract without the obligation to share in the cost of negotiations to secure the agreement." (*Id.* at 6).

6. Our response to the comments

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

With respect to Ms. Gibson's and Mr. Winters's comments that IP 36 purports to allow non-union public employees to represent themselves independently of an "exclusive representative" (or union), we disagree. Under existing law, public employees may discuss or even negotiate terms of employment with employers. Compared to other effects of the proposed measure, IP 36's emphasis on expanding such a right is not an "actual major effect" of the measure that should be included in the caption.

With respect to Ms. Gibson's comment about different references to non-union members, we note that we have deleted a second reference to non-union members in light of other changes we have made to the caption.

After considering relevant statutes and authorities pertaining to PECBA, we agree with Ms. Vaandering, Ms. Darby, Ms. Conroy, and Mr. Schwarz, that IP 36 would create a free-rider effect. The Oregon Supreme Court has repeatedly concluded that such an effect must be included in the caption. *See, e.g.*, *Novick/Bosak*, 333 Or at 26, 36 P3d 464 (2001);

Sizemore/Terhune, 342 Or at 588-89; *Towers*, 354 Or at 131. Although other existing statutory provisions may contribute to a free-rider effect that would occur if IP 36 were approved by voters, the most immediate cause of that effect is ORS 243.672(1)(a). That statute, not amended by IP 36, provides that "[i]t is an unfair labor practice for a public employer or its designated representative to do any of the following: (a) Interfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662." If IP 36 were approved, ORS 243.672(1)(a) would require a public employer to provide, upon demand by a non-union public employee, employment terms at least as favorable as those offered under the collective bargaining agreement. If a public employer were to refuse to allow that non-union public employee terms at least as favorable as the union-bargained terms, the "natural and probable effect" of that refusal is that the public employer would violate ORS 243.672(1)(a) by interfering with or coercing that employee with respect to the protected decision whether to join a union. *See Oregon Nurses Association v. Oregon Health & Science University*, 19 PECBR 590, 602 (2002) (a public employer violates ORS 243.672(1)(a) when "the natural and probable effect of the employer's action would be to interfere with, restrain, or coerce employees in the exercise of their protected rights"). A public employer's refusal to offer union-bargained terms would leave the non-union public employee to consider two options: (1) accept the public employer's offered employment terms (which are subjectively inferior from the public employee's perspective); or (2) join the union to obtain the union-bargained terms. That is, the "natural and probable effect" of the public employer's refusal would be to pressure the non-union public employees to accept union membership in order to obtain desired union-bargained employer terms. Because PECBA would legally entitle a non-union public employee to obtain at least union-negotiated employment terms, and because IP 36 prohibits a public employer and public employee union from requiring that non-union public employee to share in the union's representation costs, there is a free-rider effect in IP 36.

We also agree with Ms. Vaandering, Ms. Darby and Ms. Conroy that the phrase "[p]rohibits public employee unions from representing non-members" is inaccurate because a union's representation requirements are uncertain. To some extents, unions will directly or indirectly represent non-members in negotiation and possibly in contract administration matters. We agree that the caption should be revised to reflect that a union's representation obligations will be "modified" by IP 36.

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

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

B. The "yes" vote result statement

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

Result of "Yes" Vote: "Yes" vote prohibits public employee union from representing non-members, requiring contributions from non-members; prohibits less favorable employment terms for non-members. Union membership requires annual renewal.

We address the comments and objections below.

1. Comments from Ms. Gibson

Ms. Gibson argues that the "yes" vote result statement is deficient in several respects. First, she argues that the statement fails to explain that the most significant effect of IP 36 is that non-union public employees would be allowed to represent themselves and negotiate their salary and hours directly with a public employer. (Gibson Letter, 4). Second, she objects that the statement inappropriately uses the term "contributions" because that term "implies that a payment is being given voluntarily or as a gift when, as a matter of law, they are required when agreed to by unions and public employers. (*Id.*). Third, she argues that the statement incorrectly states that the measure prohibits "less favorable" terms when the measure prohibits "*discriminatory* employment terms." (*Id.* at 4-5).

2. Comments from Mr. Winters

Mr. Winters raises two objections. First, he raises a similar objection to the one he made concerning the caption, which is that the "yes" vote result statement should "follow a similar tack" and identify the primary subject of the measure, to identify "the new rights gained by public employees that choose to not join a union." (Winters Letter 1-2). Second, he argues that the phrase "prohibits less favorable employment terms for non-members" is inaccurate as the measure would prevent public employers from imposing "discriminatory terms or conditions" on "Independent Public Employees." (*Id.* at 2). He proposes that the "yes" vote result statement should read: "'Yes' vote permits public employees to represent themselves as 'Independent Public Employees' without union intervention. Unions barred from charging representation fees to Independent Public Employees." (*Id.*).

3. Comments from Ms. Vaandering and Ms. Darby

Ms. Vaandering and Ms. Darby raise four objections to the "yes" vote result statement. First, they object that the phrase "prohibits public employee union from representing non-members" is inaccurate and overbroad because "the fact remains that the union's representation of the bargaining unit means that it is representing the interests of all bargaining unit employees, including non-members." (Olney Letter, 12). They offer two examples: (1) an employee's status may as a union member may change during a collective bargaining agreement, and or (2) PECBA's non-discrimination provisions will entitle an employee's wages and benefits to be set by the union contract. (Olney Letter, 12). Second, they object that the statement fails to identify a free-rider effect. (*Id.*). Third, they argue that the phrase "prohibits less favorable employment terms for non-members" is inaccurate and inappropriate because IP 36 only bars "discriminatory" treatment or terms, the caption improperly interprets that term to mean "less favorable", and existing law already prohibits discriminatory treatment. (*Id.* at 12-13). Fourth, they argue that the statement's explanation of annual membership is "neither accurate nor

necessary" because IP 36 does not necessarily change membership status in a union. (*Id.* at 13). They contend that the statement should read: "'Yes' vote allows public employees in union-represented bargaining unit to refuse to share cost of bargaining wage/benefits they receive; modifies union's representation obligations." (*Id.*).

4. Comments from Ms. Conroy

Ms. Conroy argues that the "yes" vote result statement is deficient in several respects. First, she argues that the statement fails to mention the free-rider effect of IP 36. (Berman Letter, 6). Second, she argues that the phrase "[p]rohibits less favorable employment terms for non-members" is misleading and biased because existing law already prohibits public employers and public employee unions from treating members and non-members differently. (*Id.*). Third, she argues that the phrase "[u]nion membership requires annual renewal" is inaccurate and unnecessary because IP 36 does not make annual renewal a condition of union membership in all instances, and because the statement may mislead voters into believing union membership may be compelled or required. (*Id.*).

5. Comments from Mr. Schwarz

Mr. Schwarz argues that the "yes" vote result statement is deficient because it "seriously misstates that public employee unions can 'decline representing non-members.'" (Schwarz Letter, 7). Schwarz contends that IP 36 provides public employees with a right to annually designate union membership and representation together, and that IP 36 "puts the representation question to the individual public employees, not the union." (*Id.*).

6. Conclusion

After consideration of the comments concerning the draft caption, we agree that the caption should be revised. With respect to Ms. Gibson's and Mr. Winters's comments, we disagree that the "yes" vote result statement should identify that IP 36 provides non-union public employees in union-represented bargaining units the right to independently represent themselves in negotiations with the public employer. We agree with Ms. Gibson's comment that the term "contributions" should be changed or eliminated. We also agree with the several comments that the term "less favorable" should be changed or eliminated. We further agree that the phrase "prohibits public employee union from representing non-members" should be modified to reflect uncertainty about the extent to which a union would be entirely prohibited from directly or indirectly representing non-members in bargaining or contract administration matters. Lastly, we agree that the reference to annual membership should be removed.

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

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

C. The "no" vote result statement

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

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

We address the comments and objections below.

1. Comments from Ms. Gibson

Ms. Gibson objects that the "no" vote result statement fails to mention that if the measure failed, non-union public employees "would continue to be prohibited from negotiating their employment conditions and presenting grievances to their employer without the intervention of unions." (Gibson Letter, 5). She suggests that the statement should read: "'No' vote retains prohibition of self-representation for public employees choosing to not join union; requires unions to represent non-members; allows required payments from non-members." (*Id.*).

2. Comments from Mr. Winters

Mr. Winters objects that the "no" vote result statement is deficient for the same reasons asserted concerning the caption and "yes" vote result statement, *i.e.* that under existing law non-union public employers lack the right to negotiate with public employers. (Winters Letter, 2). He offers the following proposed statement: "'No' vote retains laws requiring public employee unions to represent non-members and permitting charges to non-members for union services. Annual membership renewals are not required." (*Id.* at 2-3).

3. Comments from Ms. Vaandering and Ms. Darby

Ms. Vaandering and Ms. Darby contend that the "no" vote result statement is deficient in three respects. First, they contend that the statement should identify that non-union public employees in union-represented bargaining unit will continue to receive the benefits of collective bargaining. (Olney Letter, 14). Second, they argue that the statement is misleading by only referring to a union's duty to provide representation for non-members and should also explain that it provides representation for "everyone in the bargaining unit – both members and non-members." (*Id.*). Third, they argue that the reference to membership renewals is inaccurate and unnecessary. (*Id.*). They propose that the "no" vote result statement should follow the same statement used for IP 9 (2014): "'No' vote retains current law allowing collective bargaining

agreements requiring non-member, union-represented public employees to share in costs of representation union legally must provide." (*Id.*).

4. Comments from Ms. Conroy

Ms. Conroy argues that the "no" vote result statement is deficient in several respects. First, she contends that the statement is inadequate for the same reasons she identified concerning the caption and "yes" vote result statement. (Berman Letter, 5). Second, she contends that the statement is inaccurate because it suggests that a non-member may be required to share in payment of representation costs for non-members only (rather than all bargaining unit members). (*Id.* at 6). Third, she objects that the phrase "[m]embership renewals not required" is erroneous to the extent that it suggests that union membership may be forced upon public employees. (*Id.* at 6-7). She argues that under current law, a non-union public employee may be required to share in the representation costs a union provides for *all bargaining unit members*, and not just the costs incurred to represent non-members. (Berman Letter, 6). She contends that the Attorney General should instead use the "no" vote result statement ultimately approved for IP 9 (2014). (*Id.* at 7).

5. Comments from Mr. Schwarz

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

6. Our response to the comments

After consideration of the comments concerning the "no" vote result statement, we agree that the statement should be modified.

First, we disagree with the objections that the statement should identify that non-union members would be prohibited from negotiating employment terms or grievances with public employers, because existing law is more complex than that. Second, we agree with that the statement should be clarified that non-union employees are required to share in the cost of representing all bargaining unit members. Third, we agree that the statement concerning membership renewals is unnecessary.

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

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

D. The summary

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

> **Summary:** Current law allows public employees to bargain collectively through a labor organization/union of their choosing as their exclusive representative; prohibits requiring union membership as a condition of public employment; requires union to fairly represent both members and non-members in bargaining unit; allows collective bargaining agreements requiring public employees who choose not to join union to share the costs of the legally required union representation. Measure prohibits union from representing non-members; allows non-member public employees to bargain individually regarding salary, benefits, other terms of employment, prohibits employers from giving non-members less favorable employment terms; requires union members to renew membership annually. Measure applies to new, renewed, or extended contracts entered into after the effective date of the measure. Other provisions.

We address the comments and objections below.

1. Comments from Ms. Gibson

Ms. Gibson objects to the summary in several respects. First, she contends that the phrase "of their choosing" is inaccurate because public employees may only be represented by the union that has been certified to be their "exclusive representative." (Gibson Letter, 6-7). Second, she argues that the summary should include the statement "Measure affirms public employee's right to join or not join union"—to ensure that voters do not mistakenly believe that IP 36 "does not affirm the [choice] to join or not join a union[.]" (*Id.* at 7). Third, she contends that use of the term "fairly"—as contained in the phrase "requires union to fairly represent both members and non-members in bargaining unit"—is a "value-laden term" that suggests that the Attorney General describes or endorses existing law as being "fair." (*Id.* at 8). Fourth, she argues that the phrase "less favorable"—as used in "prohibits employers from giving non-members less favorable employment terms"—is inaccurate. (*Id.*).

2. Comments from Mr. Winters

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

3. Comments from Ms. Vaandering and Ms. Darby

Ms. Vaandering and Ms. Darby object to the summary in three respects. First, they argue that the summary should identify by alerting voters of the two broad types of representation unions provide, negotiation and contract enforcement. (Olney Letter, 15). Second they argue that the summary should describe the duty of fair representation to "make clear that the duty applies to all bargaining unit members, regardless of membership." (*Id.*). Third, they argue that it is inaccurate to state that IP 36 would "categorically" prohibit unions from representing non-members. (*Id.*). Fourth, they argue for similar reasons that it is inaccurate to state that IP 36 would allow non-union employees to "bargain individually." (*Id.*). Fifth, they argue that the phrase "prohibits employers from giving non-members less favorable employment terms" is "inaccurate and politically loaded." (*Id.* at 16). Sixth, they object that the summary fails to adequately describe the free-rider effect of IP 36. (*Id.*).

4. Comments from Ms. Conroy

Ms. Conroy objects to the summary in four respects. First, she contends that the summary must describe the free-rider issue. (Berman Letter, 7). Second, she argues that the phrase "[m]easure removes requirements that public employee unions represent non-union members" overstates what IP 36 does because of the uncertain effect the measure would have on a union's representation obligation to non-members. (*Id.*). Third, she argues that the term "less favorable" is inaccurate and biased in favor of passage of IP 36. (*Id.*). Fourth, she contends the phrase "union members must renew membership annually" overstates the effect of IP 36 and that the summary should inform voters that IP 36 "changes" or "modifies" membership renewal requirements. (*Id.*).

5. Comments from Mr. Schwarz

Mr. Schwarz objects that the summary contains all of the flaws he addressed concerning the other parts of the ballot title, and that the summary should be modified to explain that IP 36 gives all public employees, not just union members, "the annual option to designate member *and* representation." (Schwarz Letter, 7).

6. Conclusion

After consideration of the comments, we agree that the summary should be modified. First, we agree that the phrase "of their choosing" should be deleted. Second, we disagree that the summary should include the statement "Measure affirms public employee's right to join or not join union" as that principle is readily understandable from the entire content of the summary (in addition to the other parts of the ballot title). Third, we agree that the term "fairly," as used in the summary's description of a union's duty of fair representation, should be deleted. Fourth, we agree that the summary should discuss a union's representation to include contract negotiation and administration. Fifth, we agree that the phrase "less favorable" should be deleted or modified. Sixth, we agree that the summary must identify the free-rider effect of IP 36. Seventh, we agree that the phrase "[m]easure removes requirements that public employee unions represent non-union members" should be modified in light of the uncertain effect of IP 36 on a union's authority or ability to represent non-union members directly or indirectly. Eighth, we

agree that the phrase "allows non-member public employees to bargain individually * * *" should be modified. Ninth, we agree that the summary's explanation of union membership renewal should be modified.

In light of the revisions made for the reasons described above, we certify the following summary:

> **Summary:** Current law allows public employees to bargain collectively through a labor organization/union as their exclusive representative; prohibits requiring union membership as a condition of public employment; requires union to represent (in negotiations and contract enforcement) all public employees in bargaining unit; allows collective bargaining agreements requiring non-members in bargaining unit to share the costs of the legally required union representation. Measure states that public employee union may only represent union members in bargaining unit; non-members may represent themselves (effects are unclear). Measure prohibits requiring non-members to pay union representation costs, including costs of negotiating agreements setting wages/benefits received by non-members; changes membership and renewal procedures. Measure applies to new/renewed/extended contracts entered into after the effective date of the measure. Other provisions.

E. Conclusion

We certify the attached ballot title.

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Enclosure

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Certified by Attorney General on June 17, 2015.

BALLOT TITLE

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

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

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

Summary: Current law allows public employees to bargain collectively through a labor organization/union as their exclusive representative; prohibits requiring union membership as a condition of public employment; requires union to represent (in negotiations and contract enforcement) all public employees in bargaining unit; allows collective bargaining agreements requiring non-members in bargaining unit to share the costs of the legally required union representation. Measure states that public employee union may only represent union members in bargaining unit; non-members may represent themselves (effects are unclear). Measure prohibits requiring non-members to pay union representation costs, including costs of negotiating agreements setting wages/benefits received by non-members; changes membership and renewal procedures. Measure applies to new/renewed/extended contracts entered into after the effective date of the measure. Other provisions.

CERTIFICATE OF FILING

I hereby certify that I electronically filed the PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition 36) with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system pursuant to ORAP 16 on June 30, 2015.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition 36) upon the following individuals on June 30, 2015, by delivering a true, full and exact copy thereof via U.S. Mail to:

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

Jeanne Atkins, Secretary of State
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DATED this 30th day of June, 2015.

GIBSON LAW FIRM, LLC

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