

IN THE SUPREME COURT OF THE STATE OF OREGON

TERRY WITT and SCOTT DAHLMAN,

Petitioners,

v.

ELLEN F. ROSENBLUM, Attorney
General, State of Oregon,

Respondent.

Supreme Court Case No. S _____

**PETITION TO REVIEW BALLOT TITLE
CERTIFIED BY THE ATTORNEY GENERAL**

(Oral Argument Requested)

Ballot Title (Elections Division No. 27)
Certified on September 26, 2013

Chief Petitioners: Scott Bates and Theresa Flaherty

John DiLorenzo, Jr., OSB # 802040
DAVIS WRIGHT TREMAINE LLP
1300 SW Fifth Avenue, Suite 2400
Portland, OR 97201-5682
E-mail: johndilorenzo@dwt.com
Telephone: 503-241-2300
Facsimile: 503-778-5299

ATTORNEY FOR PETITIONERS

Scott Bates
SW Bretton Ct.
Tigard OR 97224

Teresa Flaherty
533 Snow White Way SE
Salem, OR 97302

CHIEF PETITIONERS

Ellen F. Rosenblum, OSB # 753239
Attorney General of the State of Oregon
Office of the Solicitor General
1162 Court Street NE, Room 400
Salem, OR 97301
E-mail: ellen.f.rosenblum@doj.state.or.us
Telephone: 503-378-6002

ATTORNEY FOR RESPONDENT

1.

Petitioners Terry Witt and Scott Dahlman are electors of this State, persons dissatisfied with the ballot title that is the subject of this action, and are adversely affected by Respondent's actions. Petitioners have standing pursuant to ORS 250.085(2) as electors dissatisfied with a ballot title for an initiated measure who timely submitted written comments concerning the draft ballot title.

2.

The text of the initiative measure proposed by the Chief Petitioner (Elections Division 27) is attached as Exhibit 1.

3.

On August 27, 2013, the Attorney General submitted a draft ballot title to the Secretary of State for the prospective initiative petition. On September 11, 2013, Petitioners submitted timely comments to the Attorney General's draft ballot title. A copy of those comments is attached as Exhibit 2. Petitioners challenge the certified ballot title based upon the Attorney General's failure to incorporate comments made by the Petitioners as provided in ORS 250.067.

4.

On September 26, 2013, the Attorney General certified a ballot title to the Secretary of State as follows:

**Some genetically engineered food (defined) for retail sale must
be so labeled, or is "misbranded"**

Result of "Yes" Vote: "Yes" vote expands definition of "misbranded" food to include some genetically engineered food (defined) when not so labeled for retail sale; allows citizen enforcement lawsuits.

Result of "No" Vote: "No" vote retains current definition of "misbranded" as used in law prohibiting the misbranding of food and the manufacture, sale, or delivery of misbranded food.

SUMMARY: Current law prohibits misbranding food; prohibits manufacture, sale, delivery of misbranded food. Measure expands definition of "misbranded" to include food for retail sale that is entirely or partially produced with genetic engineering, unless conspicuously labeled "genetically engineered" (for raw agricultural commodities) or "produced with" / "partially produced with" genetic engineering (for processed food). Exempts certain foods from expanded definition of "misbranded." Defines "genetically engineered" food as food produced from organisms whose genetic material was changed through in vitro nucleic acid techniques, certain cell fusing techniques. Any injured citizen may bring lawsuit against manufacturer/supplier for failure to label processed foods, packaged raw agricultural commodities, or against retailer for failure to label unpackaged raw agricultural commodities, under certain circumstances; prevailing citizen may get attorney fees. Other provisions.

A copy of the ballot title as certified by the Attorney General is attached to the Attorney General's letter to Gina Zejdlik dated September 26, 2013, which is attached to this Petition as Exhibit 3.

5.

The summary does not accurately or adequately summarize the measure and its major effects as required by ORS 250.035(2)(d) because the summary fails to describe the breadth of the private right of action which is created for citizen enforcement.

ARGUMENTS AND AUTHORITIES

This Court's charge is to determine whether the title substantially complies with the requirements of ORS 250.035. ORS 250.085(5). "[T]he ballot title [may] not misstate, even by implication, the law that the proposal would enact." *Novick/Bosak v. Myers*, 333 Or 18, 24 (2001). This ballot title misstates a major effect of the

change that the measure proposes because it mentions only one component of the new right of action which is created for citizens to pursue against violators and is therefore grossly under inclusive.

The goal of the summary is to ““help voters to understand what will happen if the measure is approved”” and the ““breadth of [the measure’s] impact.”” *Mabon v. Myers*, 332 Or 633, 640 (2001) (quoting *Fred Meyer, Inc. v. Roberts*, 308 Or 169, 175 (1989)). The Attorney General’s summary does not meet this goal or the requirements of ORS 250.035(2)(d).

Section 5 of the proposed measure creates, among other things, a private right of action for injunctions, and for damages and attorneys’ fees.

In particular, the proposed measure allows “any injured citizen of Oregon acting in the public interest” to bring an action to enjoin a violation “of this chapter” [emphasis added] in any court of competent jurisdiction. Section 5(3). It next provides that violations of this act constitute misbranding of food in accordance with ORS 616.215. It requires the department to enforce violations of the act according to the rules set forth in Chapter 616 for misbranded food. Section 5(2).

After providing any injured citizen of Oregon acting in the public interest the right to bring a private action to enjoin a violation of the entire chapter, it further states that manufacturers and/or suppliers are potential defendants for failure to label processed foods and packaged raw agricultural communities. Section 5(4). It further states that retailers are only potentially liable for failure to provide point-of-purchase labeling for unpackaged raw agricultural commodities and then addresses under what circumstances retailers may be penalized or held liable for failure to label raw

agricultural commodities. Section 5(4).

Section 5 therefore does not only create a cause of action for claims alleging failure to label (which would also be the case if the new private right of action were created merely for the purposes of enforcing the act); it goes beyond the act and allows a private right of action to enforce any of the provisions within the ORS chapter in which the proposed initiative will be codified, presumably ORS Chapter 616.

A private right of action to enforce provisions of ORS Chapter 616 would, in addition to the proposed labeling requirements, include seeking an injunction for any of the prohibited acts in ORS 616.215 involving the selling of food. For instance, a citizen could seek to enjoin a violation of ORS 616.217 regarding the sale of any food fish product designated as halibut. A private citizen could seek an injunction for any violation of ORS 616.325 relating to distribution and commerce of any packaged consumer commodity if certain qualifying words and phrases did not appear. In addition, a private citizen could seek to enjoin any violation of ORS 616.560 concerning the determination of menu items and typical values and the provision of accurate information to customers of chain restaurants. A private citizen could seek an injunction to curb the violation of ORS 616.700 requiring that food establishments must be constructed and maintained in clean and healthful and sanitary conditions, or ORS 616.815 concerning an open date label, or ORS 616.820 concerning labels required to be affixed to packages, or ORS 616.825 prohibiting any person to sell or offer to sell at retail any packaged perishable food after the expiration dates on the label. A private citizen could seek an injunction to prohibit the violation of ORS

616.860 concerning unit pricing or a host of other laws relating to sanitation and food service. We venture to suggest that, under the proposed initiative, a private citizen could have a private right of action to seek injunctive relief to prohibit restaurant employees from wearing soiled clothing in his or her favorite restaurant.

Finally, Section 5(5) of the proposed initiative would also allow the court to award to the prevailing plaintiff reasonable costs and attorneys' fees incurred in the investigation and prosecution of an action "to enforce this chapter." That right to a prevailing party's attorney fee is also not restricted to enforcement of "this act" but could be applicable to all of the examples detailed above.

Because the scope of the private right of action is so far reaching (to all aspects of the chapter) and certainly one that would not be anticipated by an average voter who reads the ballot title only, the ballot title should, at minimum, mention the breadth of this effect in the summary.

CONCLUSION

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

Respectfully submitted this 10th day of October, 2013.

DAVIS WRIGHT TREMAINE LLP

By /s/ John A. DiLorenzo, Jr.
John A. DiLorenzo, Jr., OSB No. 802040
1300 SW Fifth Avenue, Suite 2400
Portland, OR 97201
E-mail: johndilorenzo@dwt.com
Telephone: 503-241-2300
Facsimile: 503-778-5299

ATTORNEY FOR PETITIONERS

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OREGON:

AN ACT REQUIRING THE LABELING OF GENETICALLY ENGINEERED FOOD

Section 1. Findings and Declarations

- (1) Oregon consumers have the right to know whether the foods they purchase were produced with genetic engineering so they can make informed purchasing decisions. Labeling is necessary to ensure that Oregon consumers are fully and reliably informed about the products they purchase and consume.
- (2) Consumers overwhelmingly favor knowing whether the food they purchase and consume is produced with genetic engineering, for a variety of reasons, including health, economic, environmental, religious, and ethical. Polls consistently show that the vast majority of the public—more than 90 percent—wants to know if its food was produced with genetic engineering.
- (3) In the United States, there is currently no federal or Oregon State requirement that genetically engineered foods be labeled. In contrast, sixty-four countries, including Japan, South Korea, China, Australia, Russia, Malaysia, the European Union member states, and other key U.S. trading partners, already have laws mandating disclosure of genetically engineered foods on food labels. In 2011, Codex Alimentarius, the food standards organization of the United Nations, stated that governments are free to decide on whether and how to label foods produced with genetic engineering.
- (4) The U.S. Food and Drug Administration (FDA) does not require or conduct safety studies of genetically engineered foods. Instead, any safety consultations are voluntary, and genetically engineered food developers may decide what information to provide to the agency.
- (5) The genetic engineering of plants and animals often causes unintended consequences. Manipulating genes via genetic engineering and inserting them into organisms is an imprecise process. The results are not always predictable or controllable. Mixing plant, animal, bacterial, and viral genes through genetic engineering in combinations that cannot occur in nature may produce results that lead to adverse health or environmental consequences.
- (6) United States government scientists have stated that the artificial insertion of genetic material into plants via genetic engineering can cause a variety of significant problems with plant foods. Such genetic engineering can increase the levels of known toxicants or allergens in foods and create new toxicants or allergens with consequent health concerns.
- (7) Mandatory identification of foods produced with genetic engineering can provide a method for detecting, at a large epidemiological scale, the potential health effects of consuming such foods.
- (8) Without mandatory disclosure, consumers of genetically engineered food may unknowingly violate their dietary and religious beliefs.
- (9) Numerous foreign markets with restrictions on foods produced through genetic engineering have restricted imports of U.S. crops due to concerns about genetic engineering. Some foreign markets are choosing to purchase agricultural products from countries other than the U.S. because genetically engineered crops are not identified in the U.S., which makes it impossible for buyers to determine what does or does not meet their national labeling laws or restrictions and thus renders U.S. products less desirable.
- (10) Mandatory identification of foods produced with genetic engineering can be a critical method of preserving the economic value of exports or domestically sensitive markets with restrictions on, or prohibitions against, genetic engineering.
- (11) Oregon's agricultural economy is also remarkably diverse, third overall among the states. 225 agricultural commodities are produced in Oregon, and the state is the top producer nationally of 14 of those. Over 80% of Oregon's agricultural products exported out-of-state, and agricultural products rank second in value among Oregon exports. Preserving the identity, quality, and reliability of Oregon's agricultural products and exports is critical to Oregon's economic well-being.

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KATE BROWN
SECRETARY OF THE STATE

EXHIBIT

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(12) Organic food sales are increasing. While total U.S. food sales are virtually unchanged, growing less than 1 percent yearly, the organic food industry grew at a rate of 9.5 percent in 2011, and, for the first time, surpassed the 30 billion dollar mark. Sales of organic fruits and vegetables are up 11.8 percent, accounting for approximately 12 percent of all U.S. fruit and vegetable sales. Organic dairy is growing at 9 percent per year and comprises nearly 6 percent of the total U.S. dairy market. Trade industry data shows that, over the long term, organic farming is more profitable and economically secure than conventional farming. Organic farmers are prohibited from using genetically engineered seeds. Nonetheless, organic crops are routinely threatened with transgenic contamination from neighboring fields of genetically engineered crops. The risk of contamination can erode public confidence in organic products, significantly undermining the job-creating, economy-boosting growth of the organic market. Requiring the labeling of foods produced through genetic engineering will help protect organic by increasing identification of genetically engineered foods through the food production process, thereby reducing the risk of contamination.

(13) United States Department of Agriculture (USDA) data shows that Oregon ranks 3rd in organic farm-gate sales at \$233 million a year. This important element of Oregon's economy must be protected. Foods identified as non-genetically engineered constitute the fastest growing market segment in agriculture, with annual sales increases in 2011 between 20 and 27 percent. However, only a small portion of the food industry participates in voluntary labeling of foods claimed not to be the product of genetic engineering. Nor are there consistent standards for such labeling, or for enforcement of voluntary labels. As such, voluntary labels are insufficient to provide consumers with adequate information on whether or not the food they are purchasing was produced with genetic engineering, and in some cases these labels may be misleading.

(14) The cultivation of genetically engineered crops can have serious effects on the environment. For example, in 2012, 93 percent of all soy grown in the U.S. was engineered to be herbicide resistant. In fact, the vast majority of genetically engineered crops are designed to withstand herbicides, and therefore promote indiscriminate herbicide use. As a result, genetically engineered crops have caused 527 million pounds of additional herbicides to be applied to the nation's farmland. These toxic herbicides damage the vitality and quality of our soil, contaminate our drinking water, and pose health risks to consumers and farmworkers. Further, because of the consequent massive increase in use of herbicides, herbicide-resistant weeds have developed and flourished, infesting farm fields and roadsides, complicating weed control for farmers, and causing farmers to resort to more and increasingly toxic herbicides.

(15) The people of Oregon should have the choice to avoid purchasing foods produced in ways that can lead to such environmental harm.

Section 2. Statement of Purpose

(1) The Genetically Engineered Food Labeling Act would result in establishing a consistent and enforceable standard for labeling all foods produced using genetic engineering, and thus provide citizens of Oregon with knowledge of how their food is produced.

(2) The purpose of this measure is to facilitate exercise of the fundamental right of the people of Oregon to be fully informed about whether the food they purchase and eat is produced with genetic engineering so they can choose for themselves whether to purchase and eat such foods. Identifying foods produced through genetic engineering will help protect our state's agricultural economy and environment. This law shall be liberally construed to fulfill these purposes.

Section 3. Definitions

(1) Agriculture: The science, art, or practice of cultivating the soil, producing crops, and raising livestock or fish and in varying degrees the preparation and marketing of the resulting products.

(2) Cultivated commercially: Agricultural commodities grown or raised in the course of business or trade and sold within the United States.

(3) Department/Agency: State Department of Agriculture and Oregon Health Authority

(4) **Enzyme:** A protein that catalyzes chemical reactions of other substances without itself being destroyed or altered upon completion of the reactions.

(5) **Food:** Any articles used to feed or nourish man or other animals, chewing gum, and articles used for components, including food additives, of any such article.

(6) **Genetically engineered:** Produced from an organism or organisms in which the genetic material has been changed through the application of:

- a. In vitro nucleic acid techniques, which include, but are not limited to, recombinant deoxyribonucleic acid (DNA), direct injection of nucleic acid into cells or organelles, encapsulation, gene deletion, and doubling; or
- b. Methods of fusing cells beyond the taxonomic family that overcome natural physiological reproductive or recombinant barriers, and that are not techniques used in traditional breeding and selection such as conjugation, transduction, and hybridization.

For purposes of this definition:

1. "In vitro nucleic acid techniques" include, but are not limited to, recombinant DNA or RNA techniques that use vector systems and techniques involving the direct introduction into the organisms of hereditary materials prepared outside the organisms such as microinjection, macroinjection, chemoporation, electroporation, microencapsulation, and liposomefusion.

2. An animal that has not itself been genetically engineered, regardless of whether such animal has been fed or injected with any food or any drug that has been produced through means of genetic engineering, shall not be considered "genetically engineered" for purposes of this Chapter.

(7) **Label:** A display of written, printed, or graphic matter upon or connected to the immediate container or surface of any article; and by or under the authority of this section a requirement that any word, statement, or other information appearing on the label shall not be considered to be complied with unless such word, statement, or other information also appears on the outside container or wrapper, if any, of the bulk, wholesale, or retail package of such article or is easily legible through the outside container or wrapper.

(8) **Labeling:** Any written, printed, or graphic matter that is present on the label, accompanies the food, or is displayed near the food, including that for the purpose of promoting its sale or disposal.

(9) **Manufacturer:** The person or business that makes, processes, combines, or packages food ingredients into a finished food product.

(10) **Medical Food:** A food which is formulated to be consumed or administered enterally under the supervision of a physician and which is intended for the specific dietary management of a disease or condition for which distinctive nutritional requirements, based on recognized scientific principles, are established by medical evaluation.

(11) **Organism:** Any biological entity capable of replication, reproduction, or transferring genetic material.

(12) **Processed food:** Any food other than a raw agricultural commodity, including any food produced from a raw agricultural commodity that has been subject to processing such as canning, smoking, pressing, cooking, freezing, dehydration, fermentation, or milling.

(13) **Processing aid:**

- a. A substance that is added to a food during the processing of the food but is removed in some manner from the food before it is packaged in its final form;

b. A substance that is added to a food during processing, is converted into constituents normally present in the food, and does not significantly increase the amount of the constituents found in the food; or

c. A substance that is added to a food for its technical or functional effects in the processing but is present in the finished food at insignificant levels and does not have any technical or functional effect in that finished food.

(14) Raw agricultural commodity: Any plant, fungi, or fish in its raw or natural state, including all fruits that are washed, colored, or otherwise treated in their unpeeled natural form prior to marketing, grown or produced for human food use purposes.

(15) Retailer: means an establishment engaged in the business of selling any perishable agricultural commodity or packaged food via a storefront.

(16) Supplier: A party that supplies raw agricultural products to retailers.

Section 4 – Labeling of Genetically Engineered Foods

(1) Commencing January 1st 2016, any food offered for retail sale in Oregon is misbranded if it is entirely or partially produced with genetic engineering and that fact is not disclosed as follows:

a. In the case of a raw agricultural commodity packaged for retail sale, the manufacturer shall include the words “Genetically Engineered” appearing clearly and conspicuously on the label on the front of the package of such commodity. In the case of any raw agricultural commodity that is not separately packaged or labeled, the retailer shall include a clear and conspicuous label appearing on the retail store shelf or bin in which such commodity is displayed for sale;

b. In the case of processed food containing some products of genetic engineering, the manufacturer must label the product, in clear and conspicuous language on the front or back of the package of such food, with the words “Produced with Genetic Engineering” or “Partially Produced with Genetic Engineering.”

(2) This law shall not be construed to require either the listing or identification of any ingredient or ingredients that were genetically engineered, nor that the term “genetically engineered” be placed immediately preceding any common name or primary product descriptor of a food.

(3) Until July 1st 2019, any processed food that would be subject to this section solely because it includes one or more materials produced by genetic engineering is not misbranded provided that the engineered materials in the aggregate do not account for more than nine-tenths of 1 percent of the total weight of the processed food.

(4) In the case of raw agricultural commodities including unprocessed whole fish, the retailer is responsible for point of purchase labeling of any raw agricultural commodity that has been produced using genetic engineering. It is the responsibility of suppliers to label the container used for packaging, holding and/or transporting raw genetically engineered agricultural commodities that are delivered directly to Oregon retailers.

(5) Subsection (1) of this section does not apply to any of the following:

a. A raw agricultural commodity or food that has been grown, raised, produced, or derived without the knowing and intentional use of genetically engineered seed or food. To be included within the exclusion under this subsection, the person responsible for complying with subsection (4) of this section with respect to a raw agricultural commodity or food must obtain, from whoever sold the raw agricultural commodity or food to that person, a sworn statement that the raw agricultural commodity or food: (i) has not been knowingly or intentionally genetically engineered; and (ii) has been segregated from, and has not been knowingly or intentionally commingled with, foods that may have been genetically engineered at

any time. In providing such a sworn statement, a person may rely on a sworn statement from his or her own supplier that contains such an affirmation;

- b. Any processed food that would be subject to this section solely because one or more processing aids or enzymes were produced or derived with genetic engineering;
- c. Any alcoholic beverage similarly exempt from misbranding as defined in ORS 616.330
- d. Food that has been lawfully certified to be labeled, marketed, and offered for sale as "organic" pursuant to the federal Organic Foods Production Act of 1990, 7 U.S.C. 6501, et seq., and the National Organic Program regulations promulgated pursuant thereto by USDA;
- e. Food that is not packaged for retail sale and that either: (i) is a processed food prepared and intended for immediate human consumption, including food for sale at the deli or bakery of a retail outlet; or (ii) is served, sold, or otherwise provided in any restaurant or other food service establishment that is primarily engaged in the sale of food prepared and intended for immediate human consumption; or
- f. Medical food.

Section 5 – Enforcement—Right of Action for Violations—Damages—Attorneys' Fees

(1) The State Department of Agriculture and/or the Oregon Health Authority shall prescribe, enact, and enforce rules necessary to implement this act, provided that the department/agency is not authorized to create new exemptions beyond those listed here.

(2) Violations of this Act constitute misbranding of food, a prohibited act in accordance with ORS 616.215. The department shall enforce violations of this act according to the rules set forth in Chapter 616 for misbranded food.

(3) Any injured citizen of Oregon acting in the public interest may bring an action to enjoin a violation of this chapter in any court of competent jurisdiction if the action is commenced more than sixty days after the person has given notice of the alleged violation to the department, to the attorney general, and to the alleged violator.

(4) Manufacturers and/or suppliers are the potential defendants for failure to label processed foods and packaged raw agricultural commodities. Retailers are only potentially liable for failure to provide point-of-purchase labeling for unpackaged raw agricultural commodities. A retailer shall not be penalized or otherwise held liable for the failure to label raw agricultural commodities unless (1) the retailer is the producer or the manufacturer of the genetically engineered food, seed, or seed stock and sells the genetically engineered food under a brand it owns, or (2) the retailer's failure to label was knowing and willful. In any action in which it is alleged that a retailer has violated the provisions of this section, it shall be a defense that such retailer reasonably relied on (A) any disclosure concerning genetically engineered foods contained in the bill of sale or invoice provided by the wholesaler or distributor or (B) the lack of any such disclosure.

(5) The court may award to a prevailing plaintiff reasonable costs and attorneys' fees incurred in investigating and prosecuting an action to enforce this chapter. Such an award does not include monetary damages, only fee and cost recovery.

Section 6 – Severability

If any part or application of this Genetically Engineered Food Labeling Act is held invalid, the remainder or its application to other situations or persons shall not be affected.



Suite 2400
1300 SW Fifth Avenue
Portland, OR 97201-5630

John DiLorenzo, Jr.
503.778.5216 tel
503.778.5299 fax

johndilorenzo@dw1.com

September 11, 2013

SENT VIA FACSIMILE TO: 1-503-373-7414

Honorable Kate Brown
Elections Division
255 Capitol St NE, Ste 501
Salem, OR 97310-1306

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KATE BROWN
SECRETARY OF THE STATE

Re: Ballot Title Comments to Initiative Petition No. 27 (2014)

Dear Madam Secretary:

This office represents Terry Witt and Scott Dahlman, registered voters in the State of Oregon. We have submitted, under separate cover, comments concerning why the proposed initiative petition does not comply with procedural Constitution requirements for submission of proposed initiative petitions. The purpose of this letter is to make comments on Mr. Witt's and Mr. Dahlman's behalf to the draft ballot title prepared by the Attorney General for Initiative Petition No. 27 (2014). We are mindful that ORS 250.035(2) requires: (a) a caption not more than 15 words that reasonably identifies the subject matter of the state measure; (b) a simple and understandable statement of not more than 25 words that describes the result if the state measure is approved; (c) a simple and understandable statement of not more than 25 words that describes the result if the state measure is rejected; and (d) a concise and impartial statement of not more than 125 words summarizing the state measure and its major effect.

1. The draft result of "yes" vote statement contains a typographical error and should include a quotation mark following the word "misbranded."

2. The draft summary is deficient because it does not adequately apprise voters of the types of food exempted from operation of the proposed initiative. In our previous comments to IP No. 13, Messrs. Witt and Dahlman advocated for language that included some of the major exemptions. In response, the Attorney General said "some of the exemptions would highlight those exemptions at the expense of others, which could suggest to voters that certain exemptions are more significant than others." See letter from Attorney General to Stephen N. Trout dated June 28, 2013. To address that issue, my clients now suggest that all of the exemptions be included. The proposed language below does so. Also, the summary is deficient because it

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Hon. Kate Brown
September 11, 2013
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suggests that the citizen suit provisions only apply to the labeling requirements. In fact, Section 5 of the proposed initiative entitles citizens to seek injunctions for violations of "this chapter," i.e. ORS Ch. 616. To accommodate the changes, we suggest that more generic language be eliminated, that the section concerning citizen suits be made more concise, and that it better conform with Section 5 of the proposed initiative which extends the citizen suit provision to enjoining violations of ORS Ch. 616.

To correct these deficiencies, we suggest the following be substituted for the Attorney General's draft summary:

Current law prohibits manufacture, sale, delivery of misbranded food. Measure expands "misbranded" definition to include some food that is entirely, partially produced with genetic engineering, unless conspicuously labeled "genetically engineered" (for raw agricultural commodities) or "produced with"/"partially produced with" genetic engineering (for processed food). Exempts raw agricultural products produced without knowing use of genetically engineered seed, food; alcoholic beverages; food produced using genetically engineered processing aids/enzymes; certified organic food; medical food; food intended for immediate human consumption. Defines "genetically engineered" as produced from organisms whose genetic material was changed through in vitro nucleic acid techniques, certain cell fusing techniques. Citizens may seek injunction for violation of Food, Drink, Sanitation laws after notice to state, violator; attorney fees available if citizen prevails. Other provisions.

We ask that you request of the Attorney General a certified ballot title addressing these criticisms.

Thank you for your courtesies and time concerning this matter.

Sincerely,

cc: Terry Witt
Scott Dahlman

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KATE BROWN
SECRETARY OF THE STATE



DEPARTMENT OF JUSTICE
APPELLATE DIVISION

September 26, 2013

Gina Zejdlik
Acting Director, Elections Division
Office of the Secretary of State
141 State Capitol
Salem, OR 97310

Re: Proposed Initiative Petition — Some Genetically Engineered Food (Defined) For Retail Sale Must Be So Labeled, Or Is "Misbranded"
DOJ File #BT-27-13; Elections Division #27

Dear Ms. Zejdlik:

We have received the comments submitted in response to the draft ballot title for prospective Initiative Petition #27 (2014). Comments were submitted by John DiLorenzo, Jr., on behalf of Terry Witt and Scott Dahlman. We provide the enclosed certified ballot title.

This letter summarizes the comments we received, our response to those comments, and the reasons we made or declined to make the changes proposed by the commenters. This letter must be included in the record in the event the Oregon Supreme Court is asked to review this ballot title. ORAP 11.30(7).

The proposed measure expands definition of "misbranded" to include food for retail sale that is entirely or partially produced with genetic engineering, unless conspicuously labeled as such, and it authorizes citizen lawsuits against manufacturers/suppliers and retailers who fail to comply with the measure's labeling requirements.

The commenters point out that the draft "yes" result statement omits the closing quotation mark after the word "misbranded." We appreciate their alerting us to the error and have made the correction.

The commenters suggest that the draft summary is deficient for failure to adequately apprise voters of the types of food exempted from the requirements of the proposed measure. As the commenters note, they made a similar objection to the Attorney General's draft ballot title for IP #13 (2014), which is in many respects identical to IP #27. In their comments regarding the draft ballot title for IP #13, the commenters suggested that the summary—rather than stating that the proposed measure "Exempts certain foods from expanded definition of "misbranded"—should list what they described as three "most significant" exemptions. We chose not to make the proposed change, because it was not possible to identify each exemption to the measure's definition of "misbranded" within the word limits of ORS 250.035(2). We explained that listing

only some of the exemptions could improperly suggest to voters that those exemptions were more significant than others.

For IP #27, the commenters suggest that the summary should include all the foods exempted from the expanded definition of "misbranded." We decline to adopt that suggestion, because doing so would require omitting information about the availability of citizen lawsuits that the summary must include.

The draft summary states:

Any injured citizen may bring lawsuit against manufacturer/supplier for failure to label processed foods, packaged raw agricultural commodities, or against retailer for failure to label unpackaged raw agricultural commodities, under certain circumstances; prevailing citizen may get attorney fees.

The commenters posit that the summary is deficient because it "suggests that the citizen suit provisions only apply to the labeling requirements," whereas, in fact, the measure entitles citizens to seek an injunction for violations of "this chapter," meaning ORS Chapter 616. The commenters suggest changing the sentence quoted above to the following language from the Attorney General's certified summary for IP #13:

Citizens may seek injunction for violation of Food, Drink, Sanitation laws after notice to state, violator; attorney fees available if citizen prevails.

We do not accept that suggestion. The enforcement provisions of the two measures are significantly different, necessitating different descriptions in the summaries. In particular, the measure proposed by IP #27 identifies the potential defendants in a citizen lawsuit as the manufacturer/supplier and the retailer, and limits the liability of the retailer. The expanded enforcement provisions in IP #27 warrant extended description in the summary. Therefore, adopting the language of the certified summary for IP #13 would be inadequate.

For those reasons, we certify the draft ballot title, correcting the "yes" result statement to include the mistakenly omitted quotation mark.

Judy C. Lucas
Senior Assistant Attorney General
judy.lucas@doj.state.or.us

JCL:chc/4615918

September 26, 2013
Page 3

Enclosure

Scott Bates
SW Bretton Ct.
Tigard, OR 97224

Teresa Flaherty
Snow White Way SE
Salem, OR 97302

John DiLorenzo Jr.
Davis Wright Tremaine LLP
1300 SW 5th Ave Ste 2400
Portland, OR 97201

BALLOT TITLE

**Some genetically engineered food (defined) for retail sale
must be so labeled, or is "misbranded"**

Result of "Yes" Vote: "Yes" vote expands definition of "misbranded" food to include some genetically engineered food (defined) when not so labeled for retail sale; allows citizen enforcement lawsuits.

Result of "No" Vote: "No" vote retains current definition of "misbranded" as used in law prohibiting the misbranding of food and the manufacture, sale, or delivery of misbranded food.

Summary: Current law prohibits misbranding food; prohibits manufacture, sale, delivery of misbranded food. Measure expands definition of "misbranded" to include food for retail sale that is entirely or partially produced with genetic engineering, unless conspicuously labeled "genetically engineered" (for raw agricultural commodities) or "produced with" / "partially produced with" genetic engineering (for processed food). Exempts certain foods from expanded definition of "misbranded." Defines "genetically engineered" food as food produced from organisms whose genetic material was changed through in vitro nucleic acid techniques, certain cell fusing techniques. Any injured citizen may bring lawsuit against manufacturer/supplier for failure to label processed foods, packaged raw agricultural commodities, or against retailer for failure to label unpackaged raw agricultural commodities, under certain circumstances; prevailing citizen may get attorney fees. Other provisions.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on October 10, 2013, I directed the **PETITION TO REVIEW BALLOT TITLE** to be electronically filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, OR 97301-2563, by using the court's electronic filing system.

I further certify that, on October 10, 2013, I served one copy of the foregoing **PETITION TO REVIEW BALLOT TITLE** by causing a copy thereof to be hand delivered to the Attorney General and Secretary of State as follows:

Ellen F. Rosenblum
Attorney General of the State of Oregon
Office of the Solicitor General
1162 Court Street NE
Salem, OR 97301-4096

The Honorable Kate Brown
Secretary of State
136 State Capitol Bldg
900 Court Street NE
Salem, OR 97301-0722

and by causing a copy thereof to be mailed to the Chief Petitioners as follows:

Teresa Flaherty
Snow White Way SE
Salem, OR 97302

Scott Bates
SW Bretton Court
Tigard, OR 97224

DAVIS WRIGHT TREMAINE LLP

By /s/ John A. DiLorenzo, Jr.
John A. DiLorenzo, Jr., OSB No. 802040
1300 SW Fifth Avenue, Suite 2400
Portland, OR 97201
johndilorenzo@dwt.com
Telephone: 503-241-2300
Facsimile: 503-778-5299

ATTORNEY FOR PETITIONERS