

ELLEN F. ROSENBLUM
Attorney General



FILED January 28, 2014 01:39 PM
Appellate Court Records

FREDERICK M. BOSS
Deputy Attorney General

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

January 28, 2014

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

Re: *Arthur Towers v. Ellen Rosenblum, Attorney General, State of Oregon*
SC S061928 (Control)
Dan Harmon v. Ellen F. Rosenblum, Attorney General, State of Oregon
SC S061929

Dear Chief Justice Balmer:

Petitioners Arthur Towers and Dan Harmon have filed a ballot title challenge in the above-referenced matter. Pursuant to ORS 250.067(4), the Secretary of State is required to file with the court the written comments submitted in response to the draft ballot title. Those written comments, under the cover of Elections Division Program Representative Lydia Plukchi's letter, are enclosed for filing with the court. Pursuant to ORAP 11.30(7), we also have enclosed for filing with the court the draft and certified ballot titles, together with their respective cover letters.

Sincerely,

/s/ Patrick M. Ebbett

Patrick M. Ebbett
Assistant Attorney General
Patrick.M.Ebbett@doj.state.or.us

PME:chc/4938472

cc: Steven C. Berman/without encl.
Jill Gibson Odell/without encl.
Joseph Baessler/without encl.

IN THE SUPREME COURT OF THE STATE OF OREGON

ARTHUR TOWERS,

Petitioner,

v.

ELLEN ROSENBLUM, Attorney
General, State of Oregon,

Respondent.

Supreme Court No. S061928 (Control)

DAN HARMON

Petitioner,

v.

ELLEN F. ROSENBLUM, Attorney
General, State of Oregon

Respondent.

Supreme Court No. S061929

RESPONDENT'S ANSWERING
MEMORANDUM TO PETITIONS TO
REVIEW BALLOT TITLE RE:
INITIATIVE PETITION NO. 35
(SUPREME COURT)

Petitioner Arthur Towers (Towers) challenges the certified ballot title for Initiative Petition #35 (2014) (IP #35). Towers, who submitted comments on the draft ballot title, challenges all parts of the certified ballot title. Petitioner Dan Harmon (Harmon), who also submitted comments on the draft ballot title, challenges only the summary of the certified ballot title. As authorized by ORAP 11.30(6), the Attorney General submits this Answering Memorandum to the petitions for review.

This court reviews to decide only whether the Attorney General's certified ballot title is in "substantial compliance" with the statutory requirements. ORS 250.085(5). On review, this court "examine[s] the

proposed ballot title against the statutory requirements * * * [and is] not concerned with whether petitioners' proposed titles may be better or even whether [the court] could devise a better one[.]” *Burbidge v. Paulus*, 289 Or 35, 38, 609 P2d 815 (1980). Because the ballot title substantially complies with the requirements of ORS 250.035, this court should certify it without modification.

A. The caption substantially complies with ORS 250.035(2)(a)

The Attorney General’s caption substantially complies with ORS 250.035(2)(a), which requires a caption of up to 15 words that “reasonably identifies the [proposed measure’s] subject matter.” The caption reads:

Voters must approve “restricting” designated “employee rights” regarding minimum wage, leave, payroll deduction, collective bargaining

To determine whether the caption reasonably identify the measure’s subject matter this court first examines the text of the initiative petition and the changes it makes to existing law, and then examines the words of the caption. *Kain v. Meyers*, 337 Or 36, 41, 93 P3d 62 (2004). “Subject matter,” refers to 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). *See, e.g., Terhune v. Myers*, 342 Or 475, 480, 154 P3d 1284 (2007) (so holding). The

caption must “inform potential petition signers and voters of the sweep of the measure.” *Id.* at 479. It must identify the “principal effect” or “actual major effect” of the proposed measure, *id.*, without being inaccurate or underinclusive. *Hunnicut v. Myers*, 342 Or 491, 495, 155 P3d 870 (2007).

Towers contends that the caption is noncompliant because it includes quotation marks around the word “restricting.” Towers first argues that the quotation marks are improper because that particular conjugation of the verb “to restrict” does not appear in the text of the initiative. Towers acknowledges that other conjugations of the verb do appear in the text, observing that Section 1 of the initiative refers to “employee rights” that “should not be restricted” and that Sections 4 through 6 discuss the initiative’s voter-approval requirement for any law that “restricts” designated employee rights. (Towers Pet at 5-6). But Towers argues that the quotations around “restricting” are improper because this court has barred the use of quotation marks around words that are not used in the proposed measure. (Towers Pet at 5-6 (citing *Chamberlain v. Myers*, 344 Or 612, 616, 188 P3d 240 (2008))).

Towers reads *Chamberlain* too broadly. In that case, this court observed that it has required the Attorney General to put a term in quotation marks “when that term is used in the proposed measure and its meaning is ambiguous.”

Chamberlain, 344 Or at 616. However, that observation does not constitute a holding that the particular grammatical form of the term in quotations must be present in the proposed measure. As noted, “restricts,” and “restricted” both appear in the initiative’s text. As explained below, “restricting” is in quotation marks because, as used in the initiative, the meaning of “restricts” will be uncertain in some circumstances. The particular conjugation of the verb used in the caption does not obviate the need to signal that fact to the voters.

Towers also contends that the quotation marks are improper because the meaning of “restricts” is unambiguous. (Towers Pet at 6). According to Towers, “restrict” has a well-established definition and is frequently used in Oregon statutes. But Towers fails to recognize that, as used in the initiative, the meaning of “restricts” is subject to dispute. Indeed, the measure itself recognizes that fact.

A major effect of IP #35 is to require voter approval of legislation or ballot measures that “restrict” certain designated “employee rights.” Specifically, Section 5 provides that if a “proposed law restricts employee rights” established by IP #35, “it must be approved by the voters before coming law.” IP #35 does not otherwise explain what would be considered a “restriction” of employee rights or how to determine whether a law amounts to

such a “restriction.” But the initiative does recognize that whether a proposed law restricts employee rights is not self-evident. Section 6 provides that “in the event of a dispute” over whether a proposed law “enhances or restricts employee rights” the BOLI Commissioner shall resolve the dispute, subject to direct review by this court. In short, IP #35 itself acknowledges that what constitutes a “restriction” of employee rights will be uncertain in some circumstances.

Given that uncertainty, putting “restricts” and its derivatives in quotation marks is appropriate. As this court recognized in *Chamberlain*, the use of quotation marks is appropriate when the word is used in an “unusual or uncertain sense.” 344 Or at 616. That is the circumstance here. *See also Morgan v. Myers*, 342 Or 165, 168-69, 149 P3d 1160 (2006) (putting quotation marks around “conduct” and “personal behavior” in ballot title for initiative modifying free speech rights because those terms were, as used in the measure, undefined).

Finally, Towers contends that putting “restricting” in quotation marks will confuse voters and potential petition signers because “restricts” is not in quotation marks in the caption of IP #36. But the reason for the difference is straightforward: the verb is used differently in the two measures. As used in IP

#36, the meaning of “restricts” is unambiguous. As Towers notes, Section 1 of IP #36 provides that “[n]o law shall *restrict* the ability of employers and their employees * * * to negotiate and agree upon terms governing payroll deductions.” (Emphasis added). (Towers Pet, Ex 6 at 2). In the context of that sentence, the meaning of “restricts” is clear: the ability of employers and employers to negotiate contract terms governing payroll deductions shall not be *limited* in any way. As discussed above, however, as used in IP #35, the meaning of “restricts” in the context of whether a proposed law “restricts” employee rights is uncertain.

B. The “Yes” result statement substantially complies with ORS 250.035(2)(b); the “No” result statement substantially complies with ORS 250.035(2)(c).

The “Yes” result statement substantially complies with ORS 250.035(2)(b), which requires a “simple and understandable statement of not more than 25 words that describes the result if the state measure is approved.”

The Attorney General’s “Yes” result statement reads:

Result of “Yes” vote: “Yes” vote requires voter approval of proposed laws “restricting” designated “employee rights” currently in effect under minimum wage, family leave, payroll deduction, collective bargaining law.

Likewise, the Attorney General’s certified “No” result statement substantially complies with ORS 250.035(2)(c), which also requires a “simple

and understandable statement of not more than 25 words that describes the result if the state measure is rejected.” The “No” result statement reads:

Result of “No” vote: “No” vote retains the legislature’s authority to “restrict” designated “employee rights” under minimum wage, family leave, payroll deduction, and collective bargaining law, without voter approval.

For the same reasons explained above with respect to the caption, Towers contends that the results statements are noncompliant. Towers argues that the quotation marks around “restricting” in the “Yes” statement and the quotation marks around “restrict in the “No” statement should be removed for the same because those precise words are not in the text of IP #35 and because the meaning of “restricts” is plain. For the reasons discussed above, however, use of the quotation marks is appropriate.

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

The Attorney General’s summary substantially complies with ORS 250.035(2)(d), which requires “[a] concise and impartial statement of not more than 125 words summarizing the measure and its major effect.” The Attorney General’s summary states:

Summary: Current law provides for minimum wage (annually adjusted for inflation), family leave, payroll deductions, employees’ right to organize, and collective bargaining for contract provisions—including provisions requiring all represented employees within a bargaining unit share the costs of union representation. Measure designates that law as enumerated “employee rights.” Measure requires voter approval of legislation or initiative “restricting” those rights, as they exist on January 1,

2014. Requires legislation or initiative altering those rights to describe current law and specify whether change “enhances” or “restricts” employee rights; if “restricts,” ballot title for legislation or initiative must inform voters that measure “restricts employee rights;” labor commissioner resolves disputes over whether legislation or initiative “enhances” or “restricts” employee rights, subject to review by Oregon Supreme Court. Other provisions.

Towers contends that the summary does not comply, again arguing that “restricts” and “restricting” should not be in quotation marks. As discussed above, the use of quotation marks is appropriate.

Harmon approves the use of quotation marks around “restrict” and its derivatives, but contends that those terms should be followed by the parenthetical “(undefined).” Harmon also argues that “enhancing,” and “employee rights,” should be followed by “(undefined)” as well. To be sure, this court has approved the use of that parenthetical. *See Martin/Bendl v. Myers*, 340 Or 569, 572, 135 P3d 315 (2006) (approving without discussion ballot title that included “(undefined)” after the term “treasury funds”). This court has also observed that the Attorney General “may” insert the term. *See Carley/Towers v. Myers*, 340 Or 222, 229 n 3, 132 P3d 651 (“The Attorney General may decide on referral whether to insert ‘(undefined)’ or another similar signal following the phrase ‘nursing home’ in the caption.”); *Morgan v. Myers*, 342 Or 165, 169 n 1, 149 P3d 1160 (2006) (observing that “the Attorney

General may modify the ballot title” to note that terms are undefined). But the court has not held that it is necessary.

In this circumstance, inserting the word “undefined” in various places in the summary would not assist voters or potential petition signers. First, although IP #35 does not define the terms “enhances” or “restricts,” it does set forth the process for resolving disputes over those terms. Given that the initiative provides a mechanism for defining those terms in particular instances, the use of “(undefined)” next to those terms does nothing to advance the voters’ understanding of how the initiative works. Second, the phrase “employee rights” is at least arguably defined in the initiative. Section 2 designates five specific “employee rights” for purposes of the initiative. Because the initiative specifies what it deems to be “employee rights,” inserting the parenthetical “(undefined)” next to “employee rights” would not be accurate.

In addition, Harmon asserts that the meaning of “disputes” as used in the initiative is ambiguous and, consequently, should be put in quotation marks and followed by “(undefined).” Section 5 proves that, “[i]n the event of a dispute [over whether a law enhances or restricts employee rights],” the labor commissioner will resolve it, subject to review by this court. In that usage, “disputes” need not be in quotation marks because, as used in BT #35, the word

is unambiguous: if people disagree over whether a proposed law enhances or restricts the designated employee rights, the labor commissioner will resolve the disagreement. Harmon argues that “dispute” is ambiguous because IP #35 “provides no additional guidance regarding this BOLI review process,” and fails to specify various procedural mechanisms for triggering BOLI review. (Harmon Pet at 4). Harmon may be correct that the initiative does not explain how the BOLI dispute resolution process would work, but that does not mean that the meaning of “disputes” is ambiguous. Putting “disputes” in quotations does nothing to communicate to the voter the alleged shortcomings Harmon cites. Put differently, quotation marks would not “serve to highlight ‘technical terms expected to be unfamiliar to the reader,’” or “words used in an unusual or uncertain sense.” *Chamberlain*, 344 Or at 616 (internal citation omitted).

Finally, Harmon argues that the summary inaccurately reads that the “labor commissioner resolves disputes over whether legislation or initiative ‘enhances’ or ‘restricts’ employee rights.” He contends that Section 6, which the disputed sentence summarizes, calls for commissioner review of “laws” not proposed laws such as legislation or initiatives. (Harmon Pet at 5). In the context of the other sections of the IP #35, however, “laws” as used in Section 6 is shorthand for “proposed laws.” Sections 4 and 5 both prescribe what must

occur if a “proposed law” would enhance or restrict employee rights. Section 6’s discussion of “laws” that enhance or restrict employee rights describes what must happen in the event of a dispute over whether a particular law would enhance or restrict employee rights. In that context, Section 6 is referring to the same category of proposed laws discussed in Sections 4 and 5. Accordingly, the summary accurately describes the labor commissioner’s role in resolving disputes over whether particular proposed law would enhance or restrict employee rights.

Conclusion

This court should certify the ballot title without modification.

Respectfully submitted,

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

/s/ Patrick M. Ebbett

PATRICK M. EBBETT #970513
Assistant Attorney General
Patrick.M.Ebbett@doj.state.or.us

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

OFFICE OF THE SECRETARY OF STATE

KATE BROWN
SECRETARY OF STATE



ELECTIONS DIVISION

JIM WILLIAMS
DIRECTOR

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

(503) 986-1518

January 8, 2014

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

Re: Steven Berman and Jill Gibson Odell v. Ellen Rosenblum, Attorney General, State of Oregon
Petition to Review Ballot Title

Dear Ms. Joyce:

Pursuant to ORS 250.067(4), we transmit to you for filing with the court as part of the record in the above referenced matter, the written comments filed in this office pursuant to ORS 250.067(1), regarding initiative petition #35. We also enclose the draft and certified ballot titles with their respective transmittal letters.

Sincerely,

Lydia Plukchi
Compliance Specialist

enclosures

Prospective Petition for State Measure

SEL 310

rev 1/12, OHS 250.04b

To the Secretary of State,

We, the undersigned, request a ballot title for the attached proposed measure to be submitted to the people of Oregon for their approval or rejection at the election to be held on November 4, 2014.

Type of Petition

☒ Initiative

☐ Referendum

☒ Statutory

☐ Constitutional

Designating Chief Petitioners

Every petition must designate not more than three persons as chief petitioners, setting forth the name, residence address and title (if officer of sponsoring organization) of each. All chief petitioners for an initiative or referendum petition must sign this form. Please carefully read the instructions for circulators and signers on the back of this form.

Chief Petitioner Information

Name print

1 **JOSEPH BAESSLER**

Residence Address, Street/Route

4223 NE Rodney St

City

Portland

State

Oregon

Zip Code

97201

Mailing Address if different, Street/Route

813 SW Alder St, Suite 800A

City

Portland

State

Oregon

Zip Code

97205

Email Address and/or Website

Day Phone Number

503-239-8029

Sponsoring Organization if any

Name print

Signature

2 Residence Address, Street/Route

City

State

Zip Code

Mailing Address if different, Street/Route

City

State

Zip Code

Email Address and/or Website

Day Phone Number

Sponsoring Organization if any

Name print

Signature

3 Residence Address, Street/Route

City

State

Zip Code

Mailing Address if different, Street/Route

City

State

Zip Code

Email Address and/or Website

Day Phone Number

Sponsoring Organization if any

RECEIVED
2013 OCT 10 PM 3:30
KATE BROWN
SECRETARY OF THE STATE

please read the instructions for circulators and signers on the reverse side

SEL 310

SEL 301: Statement One or More Petition Circulators Will be Paid

rev 1/12: ORS 260.045, ORS 260.165, ORS 265.165, ORS 265.135

☒ Prospective Petition initial filing with filing officer

I/We hereby declare one or more petition circulators will be paid money or other valuable consideration for obtaining signatures of active registered voters on the attached petition. I/We understand the filing officer must be notified not later than the 10th day after I/we first have knowledge or should have had knowledge that no petition circulator will be compensated for obtaining signatures. By signing this document, I hereby state that no circulators will be compensated on this petition based on the number of signatures obtained by the circulator.

☐ Completed Petition signatures submitted to filing officer

By signing this document, I hereby state that no circulators have been compensated on this petition based on the number of signatures obtained by the circulator.

Identify Petition

10/10/2013
Date Signed

Signed

Date Signed

Signed

Date Signed

→ Statement must be signed by all chief petitioners for an initiative or referendum petition.



Warning

Supplying false information on this form may result in conviction of a felony with a fine of up to \$125,000 and/or prison for up to 5 years.

SEL 301: Statement No Petition Circulators Will be Paid

rev 1/12: ORS 260.045, ORS 260.165, ORS 265.165, ORS 265.135

☐ Prospective Petition Initial Filing with Filing Officer

I/We hereby declare no petition circulators will be paid money or other valuable consideration for obtaining signatures of active registered voters on the attached petition. I/We understand the filing officer must be notified not later than the 10th day after I/we first have knowledge or should have had knowledge that any petition circulator will be compensated for obtaining signatures. By signing this document, I hereby state that no circulators will be compensated on this petition.

☐ Completed Petition Signatures Submitted to filing officer

By signing this document, I hereby state that no circulators were compensated for obtaining signatures on the attached petition.

Identify Petition

Signed

Date Signed

Signed

Date Signed

Signed

Date Signed

→ Statement must be signed by all chief petitioners for an initiative or referendum petition.



Warning

Supplying false information on this form may result in conviction of a felony with a fine of up to \$125,000 and/or prison for up to 5 years.

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KATE BROWN
SECRETARY OF THE STATE

EMPLOYEE RIGHTS AT WORK

The people of the State of Oregon hereby enact this ACT TO ESTABLISH EMPLOYEE RIGHTS AT WORK, which shall be made part of ORS Chapter 659A.

Section 1. FINDINGS: (1) Oregon's economy is strengthened when employees are treated fairly and allowed to organize and be represented by a union; (2) without legal protections, employees are vulnerable to exploitation and unfair treatment by employers; and (3) established employee rights should not be restricted without voter approval.

Section 2. The people of Oregon recognize and establish the following Employee Bill of Rights at Work:

1. The right to be paid a minimum wage for work performed, annually adjusted for inflation;
2. The right to family leave to care for oneself, a sick child or other family members;
3. The right to use payroll deductions to make contributions or conduct other financial transactions, including charitable, political or union-related deductions;
4. The right to organize with other employees free from retaliation, including the right to join together with other employees to bargain with their employer regarding the terms and conditions of employment;
5. The right to negotiate agreements requiring all employees who receive the benefits of union representation to share in the costs of that representation.

Section 3. The rights set forth in Section 2 shall be determined based on Oregon law as of January 1, 2014.

Section 4. If the legislature or the people seek to enact laws changing employee rights identified in this "Employee Bill of Rights at Work," the bill or initiative must describe current law and identify whether the proposed law enhances or restricts employee rights.

Section 5. If the proposed law restricts employee rights established by this "Employee Bill of Rights at Work," then it must be approved by the voters before becoming law. The caption for any referred or initiated measure must include the statement "restricts employee rights," which will not count towards the word limit for ballot titles.

Section 6. In the event of a dispute, the Commissioner of the Bureau of Labor and Industries shall determine whether a law enhances or restricts employee rights. The Commissioner's decision will be subject to direct review by the Oregon Supreme Court for errors of law.

Section 7. Nothing in this Act is intended to conflict with or otherwise limit employee rights under federal law. The provisions of this Act are intended to be severable and if any part of this Act is held invalid or unconstitutional, the remaining provisions shall remain in full force and effect.

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KATE BROWN
SECRETARY OF THE STATE

ELLEN F. ROSENBLUM
Attorney General



MARY H. WILLIAMS
Deputy Attorney General

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

November 20, 2013

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

Re: Proposed Initiative Petition — Designates Certain Laws as Employee Rights; Proposed
Restrictions Must Be Identified and Approved By Voters
DOJ File #BT-35-13; Elections Division #35

Dear Ms. Zejdlik:

We have prepared and hereby provide to you a draft ballot title for the above-referenced prospective initiative petition. The proposed measure relates to a requirement for voter approval of laws restricting certain employee rights.

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

A copy of the draft ballot title is enclosed.

Sincerely,

C
Cameron Craft
Legal Secretary

chc/4799878

Enclosure

Joseph Baessler
813 SW Alder St. Suite 800A
Portland, OR 97205

RECEIVED
2013 NOV 20 PM 2 54
KATE BROWN
SECRETARY OF THE STATE

DRAFT BALLOT TITLE

Designates certain laws as employee rights; proposed restrictions must be identified and approved by voters

Result of "Yes" Vote: "Yes" vote requires voter approval of laws restricting designated employee rights under minimum wage, family leave, payroll deduction, collective bargaining laws in effect January 2014.

Result of "No" Vote: "No" vote retains existing law allowing laws restricting employee rights, including minimum wage, family leave, payroll deduction, and collective bargaining laws, without requiring voter approval.

Summary: Current statutes provide for annually inflation-adjusted minimum wage and family leave for certain categories of employees, payroll deductions for certain purposes, collective bargaining for contract provisions—including provisions that require all represented employees within a bargaining unit to share the costs of union representation. Measure deems those laws, as in effect on January 1, 2014, to protect enumerated employee rights. Measure requires any legislation or initiative that alters those rights to describe current law and specify whether legislation/initiative enhances or restricts employee rights; disputes over whether a provision enhances or restricts employee rights resolved by labor commissioner; requires voter approval of any legislation/initiative restricting those rights; requires ballot title for such legislation/initiative inform voters that measure "restricts employee rights." Other provisions.

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KATE BROWN
SECRETARY OF THE STATE



December 5, 2013

Via Facsimile - (503) 373-7414

The Honorable Kate Brown
Secretary of State
Elections Division
255 Capitol Street NE, Ste 501
Salem, OR 97310-0722

RECEIVED
2013 DEC 5 PM 1 37
KATE BROWN
SECRETARY OF THE STATE

Re: Public Comment on Initiative Petition #35 (2014)

Dear Secretary Brown,

I represent Dan Harmon, who is an elector in the State of Oregon and wishes to comment on the draft ballot title for IP #35 (2014). The Attorney General has proposed the following ballot title for IP #35:

**Designates certain laws as employee rights;
proposed restrictions must be identified and approved by voters**

Result of "Yes" Vote: "Yes" vote requires voter approval of laws restricting designated employee rights under minimum wage, family leave, payroll deduction, collective bargaining laws in effect January 2014.

Result of "No" Vote: "No" vote retains existing law allowing laws restricting employee rights, including minimum wage, family leave, payroll deduction, and collective bargaining laws, without requiring voter approval.

Summary: Current statutes provide for annually inflation-adjusted minimum wage and family leave for certain categories of employees, payroll deductions for certain purposes, collective bargaining for contract provisions - including provisions that require all represented employees within a bargaining unit to share the costs of union representation. Measure deems those laws, as in effect on January 1, 2014, to protect enumerated employee rights. Measure requires any legislation or initiative that alters those rights to describe current law and specify whether legislation/ initiative enhances or restricts employee rights; disputes over whether a provision enhances or restricts employee rights resolved by labor commissioner; requires voter approval of any legislation/initiative restricting those rights; requires ballot title for such legislation/initiative inform voters that measure "restricts employee rights." Other provisions.

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December 5, 2013
Comments on IP 36
Page 2 of 4

I. 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." To comply with this standard, case law requires that the caption identify the proposal's subject matter in terms that will not "confuse or mislead potential signers and voters." *Kain/Waller v. Myers*, 337 Or 36, 40 (2004). The Oregon Supreme Court has emphasized that the "subject matter" is the "actual major effect" of the measure. *Lavey v. Kroger*, 350 Or 559 563 (2011). If a draft ballot title is challenged for failure to comply with these requirements, upon review the Oregon Supreme Court's "initial task is to determine whether the title prepared by the Attorney General is unfair or insufficient." *Remington v. Paulus*, 296 Or 317, 320 (1984).

The draft caption does not meet these statutory requirements because it includes the vague and undefined term "restrictions." IP 35 seeks to institute a new initiative process for measures which "restrict" employee rights, but the measure does not explain what would be considered a "restriction" of employee rights or how to determine whether a change amounts to such a "restriction." In fact, the text of the measure concedes that a "restriction" may not be self-evident by adding the provision, "In the event of a dispute, the Commissioner of the Bureau of Labor and Industries shall determine whether a law enhances or restricts employee rights." This provision shows that even the drafters of IP 35 foresee disputes and uncertainty regarding what qualifies as a "restriction" of employee rights.

Because the term "restricts" is ambiguous as used in the measure, the appropriate solution for purposes of drafting the ballot title is to put it in quotation marks. See, e.g., *Morgan v. Myers*, 342 Or 165, 169, 149 P3d 1160 (2006) (adding quotation marks around words "conduct" and "personal behavior" in ballot title involving free speech rights, when terms were undefined in measure itself). The term should also be modified by the word "undefined" in parentheses. See, e.g., *Martin/Bendl v. Myers*, 340 Or 569, 572, 135 P3d 315 (2006) (certifying ballot title using phrase from measure identified by quotation marks and modified by word "undefined" in parentheses). This approach will inform voters that the measure uses the word "restricts"¹ without providing a definition.

We propose the following caption:

**Designates certain laws as employee rights; voters must approve of measure that
"restricts" (undefined) such**

II. RESULT OF "YES" VOTE

250.035(2)(b) requires that a ballot title contain a "simple and understandable statement," 25 words long, explaining what will happen if the measure is approved. The purpose of this portion of the ballot title is to "notify petition signers and voters of the results of enactment that

¹ IP 35 uses the word "restricts." However, given the close derivation, the same rule should apply to "restrictions."

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December 5, 2013
Comments on IP 36
Page 3 of 4

would have the greatest importance to the people of Oregon. *Novick v. Myers*, 337 Or 568, 574 (2004).

The draft "Yes" statement does not meet this requirement because of the same reason as stated above. Specifically, the "Yes" statement uses the vague word "restricting" without indicating that the word is used but undefined in the measure. To address this defect, we suggest the following statement:

Result of "Yes" Vote: "Yes" vote requires voter approval if proposed law "restricts employee rights" (undefined) under minimum wage, family leave, payroll deduction, collective bargaining laws effective January 2014.

III. RESULT OF "NO" VOTE

ORS 250.035(2)(c) requires that a ballot title contain a "simple and understandable statement," 25 words long, 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. It is essential that the "no" vote result statement relate to the subject matter of the proposed measure to avoid misleading petition signers or voters about the effect of their signature or vote. *Nesbitt v. Myers*, 335 Or 219 (2003), (original review) 335 Or 424, 431 (2003) (review of modified ballot title).

The draft "No" statement does not comply with these requirements because it is misleading, inaccurate, and unclear in a number of ways. First, as discussed above, the draft statement inappropriately uses the unclear phrase "restricting employee rights." Second, the statement is inaccurate because it implies that *all* "laws restricting employee rights" would be affected by the measure, "including" laws regarding minimum wage, family leave payroll deduction, and collective bargaining. However, rather than "including" the listed categories of laws, the measure is limited to these types of laws.

Third, the phrase "retains existing law allowing laws restricting employee rights" is inaccurate and misleading because it makes it sound like existing law restricts employee rights. Additionally, it implies that there is a specific law that allows restricting employee rights. No such law exists; rather we have a form of government that authorizes the Oregon Legislature to enact laws generally, including laws that affect employees. If the phrase "existing law" is referring to the Legislature's constitutional powers, this should be made clear so potential signers and voters understand that a "No" vote is retaining the Legislature's ability to pass laws, not retaining a specific law which allows "restricting employee rights" without voter approval.

To cure these defects, we suggest the following "No" statement:

Result of "No" Vote: "No" vote retains existing law; retains Legislature's ability to pass a law that "restricts" (undefined) designated employee rights without referral to voters for approval.

Elections Division
December 5, 2013
Comments on IP 36
Page 4 of 4

IV. SUMMARY

ORS 250.035(2)(d) requires that a ballot contain a "concise and impartial statement of not more than 125 words summarizing the measure and its major effects." "[T]he purpose of the summary is to 'help voters understand what will happen if the measure is approved' and 'the breadth of its impact.'" *Mabon*, 322 Or at 640 (quoting *Fred Meyer, Inc. v. Roberts*, 308 Or 169, 175 (1989)).

The draft summary does not comply with these standards because, as discussed above, undefined terms such as "restricts" and "enhances" should be in quotation marks and modified by the word "undefined." Additionally, the word "disputes" is unclear and the measure does not explain what circumstances and what type of disagreement would result in the labor commissioner having to decide if a proposed law "enhances or restricts employee rights." As such, the word "disputes" should also be in quotation marks with the modifier "undefined."

To address the problems identified, we suggest the following summary:

Summary: Currently statutes provide for annually inflation-adjusted minimum wage, family leave for certain employees, payroll deductions for certain purposes, collective bargaining for contract provisions - including provisions that require all represented employees within a bargaining unit to share costs of union representation. Measure deems those laws, as in effect on January 1, 2014, to protect employee rights. Measure requires any legislation or initiative that alters those rights to describe current law and specify whether legislation/ initiative "enhances or restricts employee rights" (undefined); "disputes" (undefined) over whether a provision "enhances or restricts employee rights" (undefined) resolved by labor commissioner; requires voter approval of any legislation/initiative that "restricts" (undefined) those rights; requires ballot title for such legislation/initiative inform voters that measure "restricts employee rights" (undefined). Other provisions.

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

Very truly yours, *A.L.*

Jill Gibson Odell
Gibson Law Firm

JGO/cd

RECEIVED
2013 DEC 5 PM 1 38
KATE BROWN
SECRETARY OF THE STATE

Bill Sizemore
810 NW Rimrock Drive
Redmond, OR 97756
Email bills@otu.org

December 5, 2013

Elections Division
255 Capitol St. NE
Suite 501
Salem, OR 97310

Re: IP-35 procedural compliance comments

To the Secretary of State:

As an active, registered Oregon elector I am writing to offer my comments regarding whether initiative petition #35, which was filed by Joseph Baessler for the 2014 General Election, complies with the procedural constitutional requirements for submission of initiative petitions.

I believe this proposal violates the single subject rule. Because this measure is so sweeping and includes so many major and varied subjects that a reasonable ballot title caption and reasonably representative yes and no statements cannot be drafted, it should be rejected.

So as to reserve arguments for purposes of appeal, my letter regarding the ballot title for IP-35 is hereby incorporated by reference, as if it was set forth in full. For purposes of brevity, I summarize arguments raised in that letter to demonstrate the extensive reach of this proposal:

- (1) IP-35 creates guaranteed family leave in the public and private sector with no details as to length of time or whether the leave is paid or unpaid.
- (2) IP-35 authorizes closed "union only" shops in the public sector, which would be a major change.
- (3) IP-35 purports to require the legislature to refer all changes in laws enacting changes to "established" employee rights to the voters. This is a major alteration to the way the legislature currently operates.
- (4) IP-35 changes the ballot title process for certain measures.
- (5) IP-35 seems to require the drafters of bills and initiative petitions to state whether the bill or petition restricts or enhances employee rights.
- (6) IP-35 changes the responsibilities of the attorney general and the labor commissioner.
- (7) IP-35 requires employers to allow employees to use payroll deductions to pay all of their personal bills.

Even though the single subject rule has historically been interpreted quite broadly by the courts, it appears that this measure fails that test. It is not even possible to draft a ballot title that embraces all of the varied subjects of this measure, and thus it should be rejected.

Sincerely,

Bill Sizemore

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DEC 5 PM 2 00
KATE BROWN
SECRETARY OF THE STATE

Bill Sizemore
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Email bills@otu.org

RECEIVED
2013 DEC 5 PM 2 00
KATE BROWN
SECRETARY OF THE STATE

December 5, 2013

Elections Division
255 Capitol St. NE
Suite 501
Salem, OR 97310

Re: IP-35 draft ballot title comments

To the Secretary of State:

As an active, registered Oregon elector I am writing to offer my comments on the draft ballot title for initiative petition #35, which was filed by Joseph Baessler for the 2014 General Election.

I do not believe the draft ballot title for IP-35 complies with the standards set forth in ORS 250.035.

The subjects of this proposal are far too sweeping and varied to describe within the word limitations set forth in statute.

First, IP-35 requires that a litany of employee related issues may not be changed without voter approval. In other words, the legislature may not make certain kinds of changes to major areas of law without referring the changes to voters. In theory, this would seriously alter the way Oregon government works. However, from a practical perspective the legislature could simply ignore this statutory measure and with just one phrase, "notwithstanding ORS 659 A," ignore everything this proposed measure requires. The legislature routinely does this when it wants to write its own ballot titles for legislative referrals and does not wish to be subject to ORS 250-035. Given that fact, it is difficult to know what this measure's result would be.

Because a statute does not in reality bind the state legislature, it should be stated in the ballot title that the measure's effect on legislation is not clear given that the legislature may ignore everything in this measure or even repeal it entirely at its leisure, the referral provisions of this measure may only affect initiative petitions, which of course must be submitted to the voters anyway.

The second thing this measure purports to do is "establish" family leave to care for one's self or a family member. The measure does not say for how long or whether the leave would be paid or unpaid. Either way, the right to leave of some kind is "established" statewide. Given such sweeping language and wholesale ambiguities, it is difficult to imagine a more poorly written ballot measure.

The third thing this proposal does is "establish" the right of employees to force employers to conduct their financial affairs for them. Under the extremely broad language of subsection 3, employees could require their employers to make their car payments for them, their mortgage payments, their donations to their church or lodge, etc. The list could go on and on. Please keep in mind that IP-35 does not just recognize existing employee rights, it "establishes" the ones listed. Some of these rights do not currently exist in the form stated here and are described so vaguely that implementation would be all but impossible until a court decides what the voters intended when they passed this measure..

Elections Division

Bill Sizemore's ballot title comments for 2014 IP-35

Dec. 5, 2013

Page 2

The fourth thing this proposal would do is take part of the ballot title process out of the hands of the attorney general and place it into the hands of the labor commissioner. The labor commissioner would decide whether the ballot title would contain the words "restricts employee rights." It is not clear whether the ballot title for a measure that "enhances" employee rights must contain the phrase "enhances employee rights" or still must contain the phrase "restricts employee rights." If the various sections are read carefully, Section four suggests that the bill or measure itself must somehow state whether it restricts or enhances employee rights. Presumably, drafters of an initiative must determine in advance whether their proposal restricts or enhances employee rights. However, a careful reading of the second sentence of paragraph 2 suggests that every measure's ballot title must contain the phrase "restricts employee rights," regardless of any determination to the contrary by the drafters of the petition or the labor commissioner. This ambiguity and contradiction creates an uncertainty to which voters must be alerted.

The next change the proposal would make is perhaps its main subject among many. Under section 4, the measure allows employees to make workplaces, including public workplaces, "closed shops," meaning that no one could work there without joining a union. Under section 4, a majority of employees could negotiate the "terms and conditions of employment" as "union members only." This would be a monumental change in Oregon law and in fact outweighs every other change this measure would make. The caption and the yes and no statements should make it clear that this measure would allow a majority of employees at any workplace, public or private, to require that only union members may work there. This includes cities, counties, and school districts.

As a commenter, I will not even attempt to draft an alternative ballot title for this sweeping proposal. There are simply too many subjects to address within the word limitations and no general terminology that covers them all. Even though it has a different sponsor, it uses much of the same language at IP-36, but goes much farther.

In conclusion, IP-35 creates guaranteed family leave in the public and private sector. It authorizes closed "union only" shops in the public sector. It purports to require the legislature to refer all changes in "established" employee rights to the voters. It changes the ballot title process for certain measures. It changes the responsibilities of the attorney general and the labor commissioner. It requires employers to allow employees to use payroll deductions to pay all of their bills. Just to name some of the changes this proposal makes.

Any ballot title certified for this measure must address the issues raised here, unless of course the attorney general decides that this proposal embraces more than one subject, which I will request in a separate letter.

Thanks in advance for considering my comments.

Bill Sizemore

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KATE BROWN
SECRETARY OF THE STATE

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December 5, 2013

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The Honorable Kate Brown
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RECEIVED
2013 DEC 5 PM 3 48
KATE BROWN
SECRETARY OF THE STATE

Re. Initiative Petition 35 (2014) - Draft Ballot Title Comments
Our File No. 4815-1163

Dear Secretary Brown:

This office represents Joseph Baessler and BethAnn Darby, Oregon electors and interested parties in Initiative Petition 35 (2014). Joseph Baessler is the Chief Petitioner for IP 35 and the Political Director for AFSCME Council 75. BethAnne Darby is the Associate Executive Director of Government Relations for the Oregon Education Association. We write to comment on the draft ballot title for IP 35.

1. INTRODUCTION

Initiative Petition 35 is a statutory proposal to protect certain key employee rights from being eroded by either the legislature or the people without full knowledge of the impact and voter approval. Section 1. It does so by establishing an "Employee Bill of Rights at Work" regarding minimum wage, family leave, payroll deduction and collective bargaining. Section 2. The scope of those rights is defined by Oregon law as of January 1, 2014. Section 3.

The Honorable Kate Brown
Baessler/Darby IP 35 (2014) DBT Comments
December 5, 2013
Page 2

The significance of being identified as an employee right under Section 2 is that those rights cannot be restricted without voter approval. Section 5. To ensure that the legislature and/or the public understand the impact of a proposed law on these rights, Section 4 requires that the bill or initiative describe current law and identify whether the proposal enhances or restricts that law. If the proposed law restricts employee rights, then it must be approved by the voters. To ensure that voters understand the meaning of their vote, IP 35 requires the ballot title for a measure that would restrict employee rights to include the statement, "restrict employee rights" in the caption. Section 5. For example, if the legislature wanted to eliminate cost of living adjustments for the minimum wage, it would have to have refer the matter to voters. The caption for such a measure would have to include the phrase "restricts employee rights." Thus, a caption for this hypothetical measure might read "Restricts employee rights; eliminates requirement that the minimum wage be adjusted annually for inflation."

In the event there is a dispute over whether a proposed law restricts or enhances employee rights, the Commissioner of the Bureau of Labor and Industries will decide, with his or her decision subject to direct review in the Oregon Supreme Court. Section 6.

While portions of the draft ballot title accurately describe the measure, the caption and summary fail to adequately identify the subject and must be revised. Other portions of the ballot title can be improved to ensure that voters understand what the measure is really about. We will discuss our concerns below.

2. CAPTION

ORS 250.035(2)(a) provides that a ballot title contain "a [c]aption of not more than 15 words that reasonably identifies the subject matter of the state measure." The caption is the "headline" or "cornerstone for the other portions of the ballot title" and in order to comply with the statute, it must identify the proposal's subject matter in terms that will not "confuse or mislead potential petition signers and voters." *Kain/Waller v. Myers*, 337 Or 36, 40, 93 P3d 62 (2004) (quoting *Greene v. Kulongoski*, 322 Or 169, 174-75, 903 P2d 366 (1995)). As the court has explained, the "subject matter" is the "actual major effect" or effects of the measure. *Lavey v. Kroger*, 350 Or 559, 563, 285 P3d 1194 (2011). "To identify the 'actual major effect' of a measure, this court examines the text of the proposed measure to determine the changes that the proposed measure would enact in the context of existing law and then examines the caption to determine whether the

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Baessler/Darby IP 35 (2014) DBT Comments
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Page 3

caption reasonably identifies those effects." *Rasmussen v. Kroger*, 350 Or 281, 285, 253 P3d 1031 (2011).

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

**Designates certain laws as employee rights; proposed
restrictions must be identified and approved by voters**

The primary problem with this draft is that it is so vague that it gives voters virtually no useful information. Simply put, voters reading this caption will have no idea of what types of laws are designated as "employee rights" or the connection between those "employee rights" and "proposed restrictions" that require voter approval. *See, e.g. Rogers v. Myers*, 344 Or 219, 224 (2008) (rejecting caption as "so broad that it fails to disclose the subject matter of the proposed measure in terms that give notice to the voters of the principal substantive choice or choices that the measure presents."). It is also misleading to refer to the rights set out in Section 2 as "laws." The rights described are defined by Oregon law as of January 1, 2014, which includes both the statute and court precedent.

More fundamentally, the draft fails to adequately identify the "actual major effect" of the measure – to require voter approval in order to enact a law that restricts identified employee rights. That is, the draft leads with the uninformative and misleading phrase about designating employee rights, when Section 2 does not substantively change those rights but rather, simply affirms existing law. What is new and the actual major effect of the measure is the requirement set out in Sections 4 and 5 requiring voter approval of any law that would restrict the identified employee rights. That change should frame the description of the measure in the caption and throughout the ballot title.

To correct these problems, we suggest the following:

**Requires voter approval to restrict employee rights
regarding minimum wage, family leave, payroll deduction,
collective bargaining.**

This alternative closely tracks the "yes" vote result statement. It clearly identifies the broad category of rights that cannot be restricted without voter approval, thus making clear the significance of being designated part of the "Employee Bill of Rights at

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Page 4

Work." Additional detail regarding those laws can be added in the result statement and summary.

3. RESULT OF "YES" VOTE

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

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

RESULT OF "YES" VOTE: "Yes" vote requires voter approval of laws restricting designated employee rights under minimum wage, family leave, payroll deduction, collective bargaining laws in effect January 2014.

Although the general approach is appropriate, as with the caption, the statement should avoid suggesting that the rights are defined purely by statutory law. This change can be accomplished by referring to employee rights *established* under current law. The statement would then read:

RESULT OF "YES" VOTE: "Yes" vote requires voter approval of laws restricting employee rights established under minimum wage, family leave, payroll deduction, collective bargaining laws in effect January 2014.

4. RESULT OF "NO" VOTE:

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

The Honorable Kate Brown
Baessler/Darby IP 35 (2014) DBT Comments
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"no" result statement to simply state that a "no" vote rejects the "yes" vote. *Nesbitt v. Myers*, 335 Or 424, 431, 71 P3d 530 (2003).

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

RESULT OF "NO" VOTE: "No" vote retains existing law allowing laws restricting employee rights, including minimum wage, family leave, payroll deduction and collective bargaining laws, without requiring voter approval.

This statement is difficult to understand and potentially misleading when it states that current laws allow restrictions without voter approval. This is because "laws" include initiatives – which by definition are subject to voter approval. To correct this problem, commenters suggest that the statement specifically refer to legislative action, since that is the primary change made by IP 35. That is IP 35 requires the legislature to refer bills restricting employee rights. With regard to initiatives, the only change is in the ballot title language itself, a relatively minor change that need not be identified in the "no" vote result statement. We propose the following:

RESULT OF "NO" VOTE: "No" vote retains existing law allowing legislature to restrict employee rights, including minimum wage, family leave, payroll deduction and collective bargaining laws, without voter approval.

5. SUMMARY

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

The draft summary reads:

Summary: Current statutes provide for annually inflation-adjusted minimum wage and family leave for certain categories of employees, payroll deductions for certain purposes, collective bargaining for contract provisions –

The Honorable Kate Brown
Baessler/Darby IP 35 (2014) DBT Comments
December 5, 2013
Page 6

including provision that require all represented employees within a bargaining unit to share the costs of union representation. Measure deems those laws, as in effect on January 1, 2014, to protect enumerated employee rights. Measure requires any legislation or initiative that alters those rights to describe current law and specify whether legislation/initiative enhances or restrict employee rights; disputes over whether a provision enhances or restricts employee rights resolved by labor commissioner; requires voter approval of any legislation/initiative restricting those rights; requires ballot title for such legislation/initiative inform voters that measure "restrict employee rights." Other provisions.

Although this draft summary generally describes all aspects of the measure, it is difficult to follow and fails to adequately highlight the major effect of the proposal – to require voter approval before restricting the designated employee rights. It must be revised.

First, the description of current law is hard to read and inaccurate. As discussed above, the rights established by the "Employee Bill of Rights at Work" are based on both statute and case law interpreting those statutes. It is therefore misleading to just refer to "statutes" as the first sentence of the draft summary does.

The description of the identified rights is also difficult to understand. The challenge, of course, is to accurately describe the rights that are included in the "Employee Bill of Rights at Work" within the word space available. The draft takes the approach of adding qualifiers to each type of law – i.e., "family leave for certain categories of employees" and "payroll deductions for certain purposes." The problem is that the qualifiers do not add useful information and are underinclusive. For example, family leave is available to certain categories of employees, but it also only available for certain purposes for certain lengths of time. ORS 659A.150 *et seq.* As an alternative, we propose using the term "generally" to signal to voters that these rights are not absolute. This makes the description easier to read with fewer words.

Second, this description of the relevant current law should include the right to organize as well as the right to collectively bargain.

The Honorable Kate Brown
Baessler/Darby IP 35 (2014) DBT Comments
December 5, 2013
Page 7

Third, and most significantly, the draft summary does not sufficiently highlight the major effect of the proposal – to require voter approval before restricting the enumerated employee rights. As drafted, the summary makes it sound like the most important point of the measure is to characterize current law as of January 1, 2014 as an “employee right.” Voters will not understand that the reason this characterization matters is because those rights cannot be restricted without voter approval. Stated differently, the summary must clearly explain how those two concepts are connected.

Fourth, voters should understand that the Labor Commissioner’s determination is subject to direct review by the Oregon Supreme Court.

We propose the following:

Summary: Current statutes and case law generally provide for minimum wage (adjusted annually for inflation), family leave, payroll deductions, and the right to organize and collectively bargain, including the right to negotiate agreements requiring all represented employees to share costs of union representation. Measure designates those laws (as of January 1, 2014), to be protected employee rights that cannot be restricted without voter approval. Measure requires legislation or initiative altering those rights to describe current law and specify whether proposal enhances or restrict employee rights; any proposed law restricting employee rights must be approved by voters, with ballot title caption including phrase “restricts employee rights.” If disputed, Labor Commissioner determines whether proposal restricts employee rights, subject to direct review by Oregon Supreme Court. Other provisions.

This alternative is accurate and includes all essential concepts. It is easier to read than the draft summary and, most importantly, more clearly alerts voters to the major effect of the measure – to require voter approval of laws restricting employee rights. Describing the Labor Commissioner’s role at the end makes more sense and is consistent with the general practice of describing enforcement mechanisms after describing the operative provisions. We urge that it be adopted.


The Honorable Kate Brown
Baessler/Darby IP 35 (2014) DBT Comments
December 5, 2013
Page 8

6. CONCLUSION

Thank you for your careful consideration of these comments. We look forward to receiving the certified ballot title when it is prepared.

Sincerely,

Bennett, Hartman, Morris & Kaplan, LLP


Margaret S. Olney
Of Counsel

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STOLL BERNE

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Steven C. Berman
sberman@stollberne.com

December 5, 2013

VIA FACSIMILE

Kate Brown
Secretary of State
Elections Division
255 Capital Street NE, Suite 501
Salem, OR 97310

RECEIVED
2013 DEC 5 PM 3:48
KATE BROWN
SECRETARY OF THE STATE

Re: Draft Ballot Title for Initiative Petition No. 35 for the General Election of
November 4, 2014

Dear Secretary Brown:

I represent Arthur Towers regarding the ballot title for Initiative Petition No. 35 for the general election of November 4, 2014 ("the Initiative"). Mr. Towers is an elector in the State of Oregon. This letter is written in response to your office's press release, dated November 20, 2013, which invites comments on the draft ballot title for the Initiative.

I. An Overview of Initiative Petition 35

The Initiative provides protection to Oregon workers by creating an Employee Bill of Rights at Work. The Initiative is a statutory enactment that would become part of Oregon Revised Statutes Chapter 659A.

The Initiative has seven sections. The first section contains findings. Those findings are: (1) Oregon's economy is strengthened by having fairly treated employees who are allowed to be organized and represented by a union; (2) employees are vulnerable to exploitation and unfair treatment by employers, unless legal protections are in place; and (3) employee rights should not be restricted without voter approval.

Sections 2 and 3 recognize and establish the Employee Bill of Rights at Work. Five rights are identified in section 2. Those rights are: (1) to be paid an inflation-adjusted minimum wage; (2) to family leave to care for oneself, a child or other family member; (3) to use payroll deductions for charitable, political or representation related purposes; (4) to organize with other employees, including the right to collectively bargain regarding terms and conditions of employment; and (5) to negotiate fair share agreements. Section 3 provides that the rights set forth in Section 2 shall be determined based on Oregon law as of January 1, 2014.

Kate Brown
December 5, 2013
Page 2

Sections 4 through 6 address modification of rights recognized by the Employee Bill of Rights at Work. Section 4 provides that if the legislature or electorate seek to enact laws affecting rights identified in the Employee Bill of Rights at Work, the bill or initiative must describe extant law and set forth whether the proposed law would “enhance or restrict” employee rights. Section 5 provides that any law which restricts the employee rights established in the Employee Bill of Rights at Work must be approved by the voters before becoming law; it specifies language that must appear in the caption of any measure presented to the voters. Section 6 provides that the Commissioner of the Bureau of Labor and Industries will resolve any dispute as to whether a law enhances or restricts employee rights. The Commissioner’s decision will be subject to direct review by the Oregon Supreme Court.

Section 7 provides that the Initiative is not intended to conflict with or otherwise limit employee rights under federal law. Section 7 also includes a severability clause.

II. The Draft Ballot Title

A. The Caption

ORS 250.035(2)(a) provides that a ballot title must contain a “caption of not more than 15 words that reasonably identifies the subject matter of the state measure.” The caption must “state or describe the proposed measure’s subject matter accurately and in terms that will not confuse or mislead potential petition signers and voters.” *Lavey v. Kroger*, 350 Or 559, 563 (2011) (citations omitted; internal quotation marks omitted). The “subject matter” of an initiative is its “actual major effect.” *Lavey*, 350 Or at 563 (citation omitted; internal quotation marks omitted). The “actual major effect” is the change or changes “the proposed measure would enact in the context of existing law.” *Rasmussen v. Kroger*, 350 Or 281, 285 (2011).

The caption in the draft ballot title provides:

Designates certain laws as employee rights; proposed restrictions must be identified and approved by voters

Mr. Towers respectfully submits that the proposed caption is legally insufficient, for at least three reasons. First, “certain laws” is impermissibly vague. A caption must set forth the actual changes an Initiative will make to existing law in sufficient detail to notify the electorate as to what is at issue. As the Supreme Court recently explained in *Girod v. Kroger*, 351 Or 389, 397 (2011) “[a] caption may describe accurately the major effect of a measure and still not comply with the requirements of the statute if the description is too vague and gives voters no clear picture of what is at stake.” (Internal quotation marks omitted; citations omitted). See also *Rogers v. Myers*, 344 Or 219, 224 (2008) (rejecting caption as “so broad that it fails to disclose the subject matter of the proposed measure in terms that give notice to the voters of the principal substantive choice or choices that the measure presents”); *Terhune v. Myers*, 342 Or 475, 480 (2007) (“The Attorney General’s caption blandly refers to a ‘tax credit for educational expenses.’ That may be accurate, but it hardly can be said to note, much less highlight, the actual major effect of the proposed measure.”) The caption does not adequately inform potential

Kate Brown
December 5, 2013
Page 3

petition signers or voters of what laws actually are affected. From the caption, voters would have no way of knowing if the "certain laws" even relate to the workplace or to the employer/employee relationship. The Initiative designates only a limited number of rights, five in total. Those rights easily can be specified or summarized within the applicable word limits.

The phrase "[d]esignates certain *laws* as employee *rights*" (emphasis added) mischaracterizes the Initiative and potentially is confusing. Section 2 designates certain *rights* as employee rights. Section 3 provides that the rights shall be based on "Oregon law" as of January 1, 2014. "Oregon law" as used in Section 3 refers not just to statutes, but also to the common law found in court interpretations. From the draft caption, voters and potential petition signers could read the word "law" in the caption as referring only to existing statutes, and not to common law. That reading would be reinforced by the first two sentences of the summary, which refer to "current statutes" as "those laws" protected by the Initiative. However, the rights protected by the Initiative are not just rights found in statute.

The third flaw with the caption is that the phrase "proposed restrictions must be identified and approved by voters" is inaccurate and misleading. As written, a voter reasonably could believe that the voter is required to identify any proposed restrictions. The Initiative places the initial burden of identifying proposed restrictions on the legislature or initiative drafter. Initiative, §4. The Commissioner of the Bureau of Labor and Industries resolves any disputes as to whether a proposed law restricts employee rights. *Id.* at §6. If a measure does restrict employee rights, the Attorney General then is tasked with providing a ballot title that contains specific language so indicating. *Id.* at § 5. The responsibility for identifying proposed restrictions does not fall on the voter.

B. The Results Statements

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

The results statements in the draft ballot title provide:

Result of "Yes" Vote: "Yes" vote requires voter approval of laws restricting designated employee rights under minimum wage, family leave, payroll deduction, collective bargaining laws in effect January 2014.

Result of "No" Vote: "No" vote retains existing law allowing laws restricting employee rights, including minimum wage, family leave, payroll deduction, and collective bargaining laws, without requiring voter approval.

The result of yes statement accurately identifies the rights protected by the Initiative. However, the word "laws" in the last clause (as part of the phrase "collective bargaining laws")

Kate Brown
December 5, 2013
Page 4

is inaccurate, for the reasons set forth above. The Initiative protects extant rights, regardless of source, and not just statutory "laws."

The phrase "retains existing law" in the first clause in the result of no statement is redundant, confusing and potentially misleading. There is no "existing law" that specifically allows restricting the enumerated employee rights set forth in the Initiative.

C. The Summary

ORS 250.035(2)(d) requires that the ballot title contain a "concise and impartial statement of not more than 125 words summarizing the state measure and its major effect." The summary is flawed for the reasons set forth above. The first two sentences of the summary focus solely on existing statutes, but the Initiative protects delineated employee "rights" regardless of the source. Finally, the description of who determines whether a measure restricts employee rights under the Initiative is incomplete. The summary currently provides: "disputes over whether a provision enhances or restricts employee rights resolved by labor commissioner." Under the Initiative, the Commissioner's determination is subject to review by the Oregon Supreme Court. Initiative, §6. Voters should be so informed.

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

Very truly yours,

Steven C. Berman

SCB:jjjs
cc: client



DEPARTMENT OF JUSTICE
APPELLATE DIVISION

December 20, 2013

RECEIVED
2013 DEC 20 PM 3 22
KATE BROWN
SECRETARY OF THE STATE

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

Re: Proposed Initiative Petition — Voters Must Approve "Restricting" Designated
"Employee Rights" Regarding Minimum Wage, Leave, Payroll Deduction, Collective
Bargaining
DOJ File #BT-35-13; Elections Division #35

Dear Mr. Williams:

We have received the comments submitted in response to the draft ballot title for Initiative Petition 35 (2014). The comments were submitted by Jill Gibson Odell, on behalf of Dan Harmon; Bill Sizemore; Margaret Olney, on behalf of Joseph Baessler and BethAnne Darby; and Steven C. Berman, on behalf of Arthur Towers. 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).

Commenter Sizemore has submitted two letters commenting on the proposed initiative. In his first letter, Sizemore only raises the issue of whether the proposed initiative violates the single subject rule. That issue is beyond the scope of the ballot title drafting process. *See* OAR 165-014-0028 (providing for separate review process by Secretary of State to determine whether measure complies with constitutional procedural requirements for proposed initiative measures). In his second letter, Sizemore broadly states that the draft ballot title does not comply with ORS 250.035 and provides a critique of the measure, but does not identify any specific defects in the draft ballot caption, result statements, or summary. Accordingly, Mr. Sizemore's comments are outside the narrow scope of this response. *See* ORS 250.035 (specifying form of ballot titles).

A. The Draft Caption

The draft caption provides:

Designates certain laws as employee rights; proposed restrictions must be identified and approved by voters

Currently, Oregon law generally provides for inflation-adjusted minimum wage, family leave, payroll deductions for certain purposes, collective bargaining, and for “fair share” agreements that require non-union employees to share the cost of union representation services they receive. The subject matter of the initiative—its major effect—is to designate that body of law as protecting “employee rights” that cannot be “restricted” without voter approval.

Commenter Harmon

Commenter Harmon identifies one potential problem with the caption. He suggests that the undefined term “restricts” should be in quotation marks because “the measure does not explain what would be considered a ‘restriction’ of employee rights or how to determine whether a change amounts to such a ‘restriction.’” Harmon also recommends that the word “(undefined)” should follow the use of “restricts” or “restriction.”

We agree with Harmon’s suggestion that “restricts” should be put in quotation marks. As the commenter notes, the Supreme Court has added quotation marks to a similarly undefined term in a ballot title. *See, e.g., Morgan v. Myers*, 342 Or 165, 169, 149 P3d 1160 (2006) (adding quotation marks to the words “conduct” and “personal behavior” in ballot title for initiative modifying Oregon’s free speech clause because those terms are undefined and subject to debate).

We do not agree, however, that the term “restricts” needs to be followed by the parenthetical, “(undefined).” Although petitioner is correct that in *Martin v. Myers*, 340 Or 569, 135 P3d 315 (2006), the court approved a ballot title containing that parenthetical, the court did not hold that it was necessary. Given the limited number of words available for the caption, we do not include it.

Finally, because it is not self-evident that all of the designated laws are “employee rights,” the caption needs to reflect that the measure establishes that they are. Accordingly, we put the phrase “employee rights” in quotations as well.

Commenters Baessler and Darby

Commenters Baessler and Darby identify three potential problems with the caption. First, they argue that the caption is too vague because the phrase “certain laws” does not inform the voters of what laws the measure designates as employee rights that cannot be restricted without voter approval. Second, they contend that the draft caption fails to adequately capture the major effect of the measure—to require voter approval to restrict the designated “employee rights.” Finally, they object to the use of the word, “laws,” because, they argue, the “rights” identified by the measure are contained not just in statutes, but in court precedent.

We agree that the caption is too vague. The caption must “inform potential petition signers and voters of the sweep of the measure.” *Terhune v. Myers*, 342 Or 475, 479, 154 P3d 1284 (2007). And it must “disclose the subject matter of the proposed measure in terms that give notice to the voters of the principal substantive choice or choices that the measure presents.” *Rogers v. Myers*, 344 Or 219, 224, 179 P3d 627 (2008). Given the word limit, and the specific

areas of law designated as “employee rights,” the “restriction” of which requires voter approval, finding a satisfactory way to convey the “sweep of the measure” is difficult. However, with the commenters’ suggestions, we have modified the caption to satisfy that requirement.

We do not entirely agree with Baessler and Darby’s contention that the caption inadequately conveys what they characterize as the single major effect of the measure—to require voter approval of restrictions on employee rights. While that is undeniably a significant effect, we submit that the major effect is somewhat broader—it encompasses both the designation of particular Oregon law as protecting “employee rights,” *and* the requirement of voter approval to protect those designated rights. Baessler and Darby presume that it is self-evident that all of those laws are employee rights and the measure merely recognizes that fact. We do not agree that that is self-evident. Accordingly, we capture the measure’s designation of those laws as “employee rights” in the caption.

As for the use of the word “laws,” we agree that it may be unclear whether that word encompasses court precedent. Regardless, however, as modified, the caption omits the word “laws,” thus addressing Baessler and Darby’s concern.

Commenter Towers

Commenter Towers’ first two concerns about the caption—that it is too vague and that use of the word “laws” is inappropriate—mirror Baessler/Darby’s. Accordingly, those complaints are addressed above.

Towers also argues that the phrase “proposed restrictions must be identified and approved by voters,” is misleading and confusing because it incorrectly implies that the voters are the ones who identify the proposed restrictions. We agree that the draft caption is misleading in that regard. As Towers notes, the initial burden of identifying proposed restrictions is on the legislature or initiative drafter and the caption incorrectly implies otherwise.

We certify the following ballot title caption:

Voters must approve “restricting” designated “employee rights” regarding minimum wage, leave, payroll deduction, collective bargaining

B. The Result Statements

The draft “yes” result statement provides:

RESULT OF “YES” VOTE: “Yes” vote requires voter approval of laws restricting designated employee rights under minimum wage, family leave, payroll deduction, collective bargaining laws in effect January 2014.

The draft “no” vote result statement provides:

RESULT OF “NO” VOTE: “No” vote retains existing law allowing laws restricting employee rights, including minimum wage, family leave, payroll deduction, and collective bargaining laws, without requiring voter approval.

Commenter Harmon

Commenter Harmon identifies a single potential problem with the “yes” statement that mirrors his concern with the caption: that “restricts” should be in quotation marks. We agree, for the reasons stated concerning the draft caption, above.

Harmon identifies three potential problems with the “no” statement. First, he reiterates his complaint about the use of the phrase “restricting employee rights” without putting quotation marks around “restricting.” Second, he argues that the statement is misleading because, by using the word “including” before the list of laws designated as rights, the statement implies that the measure applies to all “laws restricting employee rights,” not just the ones designated in the statute. Third, Harmon contends that the phrase “retains existing law allowing laws restricting employee rights,” is inaccurate and misleading “because it makes it sound like existing law restricts employee rights,” and implies that there exists a specific law that allows restriction of employee rights.

Regarding his first complaint, for the reasons discussed above, we agree with Harmon’s concern that the use of the word “restricts” without quotation marks is problematic.

We also agree that use of the word “including” is misleading in that implies that the measure applies to more than the body of law it designates.

Moreover, we agree that the phrase “retains existing law allowing laws restricting employee rights” is confusing. We have modified the “no” result statement in response.

Commenters Baessler and Darby

Commenters Baessler and Darby identify one potential problem with the “yes” statement. As with the caption, they suggest that the statement improperly suggests that the designated “employee rights” are defined exclusively by statutory law and not also by the case law interpreting those statutes. To clarify that they propose adding the word “established” to the statement, so that the statement reads, in part, “...employee rights *established* under minimum wage, family leave, payroll deduction, collective bargaining laws in effect January 2014.”

As noted above, we agree that use of “laws” may not capture both statutes and court precedent. But we do not understand how the proposed addition of the word “established” clarifies that “laws” includes both statutory law and court precedent. We address the problem by replacing “laws” with the broader “law.”

Baessler and Darby also identify one potential problem with the “no” vote statement. They argue that the phrase “retains existing laws allowing laws restricting employee rights,” is confusing and potentially misleading. They suggest that the phrase “allowing laws” be modified to refer exclusively to legislative action since that is the primary change made by the measure. Although we do not adopt their proposed language, we agree that the statement should be modified to clarify that a “no” vote allows legislation restricting employee rights.

Commenter Towers

Commenter Towers objects to the “yes” result statement for the same reason as commenters Baessler and Darby: that the phrase “laws” does not encompass both statutes and court precedent. As noted above, we address that concern by replacing “laws” with “law.”

Regarding the “no” statement, Towers asserts the phrase “retains existing law” is “redundant, confusing, and potentially misleading.” He observes that there is no “existing law” that expressly permits restricting the designated “employee rights.” We agree, and we have modified the “no” statement accordingly.

We certify the following results statements:

Result of “Yes” vote: “Yes” vote requires voter approval of proposed laws “restricting” designated “employee rights” currently in effect under minimum wage, family leave, payroll deduction, collective bargaining law.

Result of “No” vote: “No” vote retains the legislature’s authority to “restrict” designated “employee rights” under minimum wage, family leave, payroll deduction, and collective bargaining law, without voter approval.

C. The Summary

The draft summary provides:

Summary: Current statutes provide for annually inflation-adjusted minimum wage and family leave for certain categories of employees, payroll deductions for certain purposes, collective bargaining for contract provisions—including provisions that require all represented employees within a bargaining unit to share the costs of union representation. Measure deems those laws, as in effect on January 1, 2014, to protect enumerated employee rights. Measure requires any legislation or initiative that alters those rights to describe current law and specify whether legislation/initiative enhances or restricts employee rights; disputes over whether a provision enhances or restricts employee rights resolved by labor commissioner; requires voter approval of any legislation/initiative restricting those rights; requires ballot title for such legislation/initiative inform voters that measure “restricts employee rights.” Other provisions.

Commenter Harmon

Commenter Harmon objects to the summary on three related grounds. First, he reiterates his contention that the word “restricts” should be in quotation marks. Similarly, he contends that the words “enhances” and “disputes” should be in quotation marks as well, because those terms are undefined and unclear. In addition, he requests that those words be followed by “(undefined).”

We agree, for the reasons discussed above, that “restricts” should be in quotation marks. For the same reasons, we agree that “enhances” should be in quotation marks as well.

As for the word “disputes,” we do not believe it needs to be in quotation marks because we believe that, as used in the measure, the word is sufficiently clear and unambiguous: if there is a dispute over whether a proposed law restricts or enhances employee rights, the labor commissioner will resolve it, subject to review by the Supreme Court.

For the reasons discussed in our response to the comments to the caption, we do not believe that it is necessary to include “(undefined)” after the words in quotation marks.

Commenters Baessler and Darby

Commenters Baessler and Darby object to the draft summary on six grounds.

First, they fault the use of the word “statutes” in the summary’s description of current law because they claim it does not include “case law interpreting those statutes.” We agree.

Second, the commenters contend that the description of the designated “employee rights” is difficult to understand because of the qualifying language used (such as, “certain categories” and “certain purposes”). Further, they contend that those qualifiers do not add useful information and are under-inclusive. They propose replacing the qualifiers with the word “generally” at the beginning of the description of the designated laws. Their point is well-taken but we have decided that the word “generally” is not necessary either. We conclude that the best way to resolve the problem is to simply omit the qualifying language.

Third, Baessler and Darby assert the draft summary’s description of current law does not include reference to the right to organize, separate from the right to bargain collectively. We agree that inclusion of the right to organize (one of the rights designated in section 2 of the measure) is appropriate in the summary.

Fourth, they comment that the major effect of the proposal is to require voter approval in order to restrict the designated “employee rights,” and, therefore, the summary should inform voters of that effect. We agree, and have changed the summary to better explain the major effect of the measure.

Finally, Baessler and Darby note that the summary does not inform voters that the labor commissioner's resolution of disputes over whether a measure restricts employee rights is subject to Supreme Court review. We agree, and revise the summary accordingly.

Commenter Towers


Commenter Towers also objects that the summary does not inform voters that the commissioner's resolution of disputes is reviewable by the Supreme Court. As noted above, we agree.

We certify the following summary:

Summary: Current law provides for minimum wage (annually adjusted for inflation), family leave, payroll deductions, employees' right to organize, and collective bargaining for contract provisions—including provisions requiring all represented employees within a bargaining unit share the costs of union representation. Measure designates that law as enumerated "employee rights." Measure requires voter approval of legislation or initiative "restricting" those rights, as they exist on January 1, 2014. Requires legislation or initiative altering those rights to describe current law and specify whether change "enhances" or "restricts" employee rights; if "restricts," ballot title for legislation or initiative must inform voters that measure "restricts employee rights;" labor commissioner resolves disputes over whether legislation or initiative "enhances" or "restricts" employee rights, subject to review by Oregon Supreme Court. Other provisions.

As modified, we certify the ballot title.

Sincerely,

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Enclosure

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BALLOT TITLE

Voters must approve "restricting" designated "employee rights" regarding minimum wage, leave, payroll deduction, collective bargaining

Result of "Yes" Vote: "Yes" vote requires voter approval of proposed laws "restricting" designated "employee rights" currently in effect under minimum wage, family leave, payroll deduction, collective bargaining law.

Result of "No" Vote: "No" vote retains the legislature's authority to "restrict" designated "employee rights" under minimum wage, family leave, payroll deduction, and collective bargaining law, without voter approval.

Summary: Current law provides for minimum wage (annually adjusted for inflation), family leave, payroll deductions, employees' right to organize, and collective bargaining for contract provisions—including provisions requiring all represented employees within a bargaining unit share the costs of union representation. Measure designates that law as enumerated "employee rights." Measure requires voter approval of legislation or initiative "restricting" those rights, as they exist on January 1, 2014. Requires legislation or initiative altering those rights to describe current law and specify whether change "enhances" or "restricts" employee rights; if "restricts," ballot title for legislation or initiative must inform voters that measure "restricts employee rights;" labor commissioner resolves disputes over whether legislation or initiative "enhances" or "restricts" employee rights, subject to review by Oregon Supreme Court. Other provisions.

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KATE BROWN
SECRETARY OF THE STATE

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on January 28, 2014, I directed the original Respondent's Answering Memorandum to Petitions to Review Ballot Title Re: Initiative Petition No. 35 (Supreme Court) to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and served upon Steven C. Berman, attorney for Arthur Towers, and served Jill Gibson Odell, attorney for Dan Harmon, by using the court's electronic filing system.

I further certify that on January 28, 2014, I directed the Respondent's Answering Memorandum to Petitions to Review Ballot Title Re: Initiative Petition No. 35 (Supreme Court) to be served upon Joseph Baessler, chief petitioner, by mailing a copy, with postage prepaid, in an envelope addressed to:

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/s/ Patrick M. Ebbett

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