IN THE SUPREME COURT OF THE STATE OF OREGON

HANNA VAANDERING, TRENT LUTZ, AND RICHARD SCHWARZ	)	Supreme Court Case No.
Petitioners,	)	PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL
v.	)	
ELLEN F. ROSENBLUM, Attorney General, State of Oregon,	)	Initiative Petition 2016-62
Respondent.	)	

Initiative Petition 2016-62
Ballot Title Certified November 10, 2015

Chief Petitioners:

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PETITION

Pursuant to ORS 250.085(2) and ORAP 11.30, petitioners ask the Court to review the ballot title for Initiative Petition 62 (2016) (Ex. A), certified by the Attorney General on December 1, 2015 (Exs. D & E), and to certify the changes to the ballot title proposed by petitioners, or else refer the ballot title back to the Attorney General for modification.

PETITIONERS' INTEREST

Petitioners Hanna Vaandering, Trent Lutz, and Richard Schwarz are Oregon electors who seek review of the certified ballot title in their individual capacities. Ms. Vaandering is the President of the Oregon Education Association and Mr. Lutz is the Acting Executive Director of Public Affairs. Mr. Schwarz served as executive director of American Federation of Teachers-Oregon for 24 years. Thus, petitioners have a keen interest in ensuring that this initiative has an accurate and informative ballot title. Petitioners submitted comments (Ex. C) on the draft ballot title (Ex. B), and therefore, also have standing under ORS 250.085(2) to seek review of the certified ballot title.

ARGUMENTS AND AUTHORITIES

I. Introduction.

Initiative Petition 62 ("IP 62") is yet another statutory proposal that would amend Oregon's Public Employee Collective Bargaining Act, ORS 243.650 *et seq.* (the "PECBA") to allow public employees to receive the benefit of union representation without paying all the costs of that representation.[1] It accomplishes this by granting all

[1]Petitioners will highlight the changes made by IP 62 that are most relevant to this petition. For a more detailed discussion of current law and the changes made by IP 62, petitioners

public employees in a bargaining unit: (1) full membership status in the union designated as their exclusive bargaining representative by making only certain limited payments—those which are "necessarily and reasonably incurred for the purpose of representation and collective bargaining with their employer on matters concerning employment relations"—and (2) the right to discontinue even those limited payments at any time. Section 3(2)(a)-(c). No public employee in the bargaining unit can be required to make any other payments (Sections 5(1) and 3(2)(b),ORS 243.650(18)), and even voluntary contributions are circumscribed (Section 6(3)). The union is prohibited from denying, negotiating around, or otherwise requesting waivers of these rights (Sections 4(1) and 5(2)), and its duties of fair representation and non-discrimination remain unchanged. ORS 243.672(2)(a). Thus, an employee who exercises her IP 62 right to discontinue payment at any time obtains the right to union-negotiated wages, benefits, and other terms and conditions of employment without payment. Any attempt to deny this right can be challenged by the public employee through a civil action in circuit court for injunctive or other equitable relief as well as actual damages. Section 7(1). A prevailing public employee shall be entitled to an award of reasonable costs and attorney fees. *Id.* As explained below, the certified ballot title still fails to notify voters of the "free-rider" and "membership changes" effected by the measure and the extent of remedies provided under the new enforcement scheme. Therefore, it fails to substantially comply with the statute and consistent with its prior cases, the court should refer the certified ballot title back to the Attorney General for modification.

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refer the court to their lengthy comments (Ex. C, pp. 2-6), which they incorporate herein by reference.

II. Caption

ORS 250.035(2)(a) provides that a ballot title contain "a [c]aption of not more than 15 words that reasonably identifies the subject matter of the state measure." The caption is the "cornerstone for the other portions of the ballot title" and 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." *Mabon v. Myers*, 332 Or 633, 637, 33 P3d 988 (2001)(internal citations omitted). "In determining whether a caption reasonably identifies the subject matter of a proposed measure, this court examines the text of the proposed measure itself." *Id*. at 638 *citing Earls v. Myers*, 330 Or 171, 175, 999 P2d 1134 (2000). It also considers "the changes, if any, the measure would enact in the context of existing law." *Sizemore v. Myers*, 342 Or 578, 583, 157 P3d 188 (2007)(quoting *Phillips v. Myers*, 325 Or 221, 225-26, 936 P2d 964 (1997)). The caption cannot overstate or understate the scope of the legal changes the initiative would enact. *Kain/Waller v. Myers*, 337 Or 36, 93 P3d 62 (2004).

Here, the Attorney General certified the following caption:

> **Public employee union may require dues/fees only for limited representation/bargaining activities; authorizes lawsuits**

The Attorney General correctly addresses the change in enforcement scheme in this caption because IP 62 allows enforcement of certain PECBA rights in circuit court instead of before the Oregon Employment Relations Board, which currently exercises primary, if not exclusive jurisdiction, over the PECBA (*see* ORS 243.672(3), ORS 243.676), and this represents a major change in Oregon law that "likely would be significant to the voting

public." *Sizemore v. Myers/Terhune,* 342 Or 342, 587-88, 157 P3d 188 (2007); *see also Greenberg v. Myers,* 340 Or 65, 70, 127 P3d 1192 (2006).

However, the caption is still under-inclusive and non-compliant because it fails to address the "free-rider" and "membership changes" effected by the measure. The Attorney General rejected petitioners' arguments regarding these issues based on her interpretation that, "By its terms [Section 3(2)(c)] does not modify existing law under which nonmembers can be required to make payments in lieu of dues" (Ex. D, p. 4) and that with similar references to "employment relations" in IP 62, Sections (3)(2) and (5)(1) and ORS 243.661, "unions retain the legal authority to require employees to make payments reflecting all of the work unions are legally required to perform for them." Ex. D, p. 5. This interpretation is not supported by the text of IP 62 or current operation of the PECBA.

More specifically, under current law, unions are free to set the terms and conditions of membership, including what to charge members as "dues and assessments" for the representation, collective bargaining and other activities of the union. Dues and assessments can cover costs of representation and bargaining on more than just the "mandatory subjects" included in the definition of "employment relations" in ORS 243.650(7) and can also include amounts related to purely political and ideological activity. In addition, unions can negotiate "fair share agreements" with public employers, pursuant to which employees in the bargaining unit who are not members of the union can be required to pay "payment-in-lieu-of-dues" (ORS 243.650(10),(18)), also known as fair share payments. "Payment-in-lieu-of-dues" may not include expenses that are not germane to or supportive of collective bargaining and contract enforcement over the objection of an

employee. *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 US 292 (1986); *Lehnert v. Ferris Faculty Association*, 500 US 507 (1991); *Elvin v. OPEU*, 11 PECBR 9 (1988), aff'd, 102 Or App 159 (1990), aff'd, 313 Or 165 (1992); *Carlson v. AFSCME*, 73 Or App 755, 761, 700 P2d 260 (1985); *Ebersole v. Mollala Education Ass'n/OEA/ NEA*,15 PECBR 160, 179 (1994). However, they can include the union's cost of representation and bargaining on more than just the "mandatory subjects" included in the definition of "employment relations" in ORS 243.650(7) and within the union's duty as exclusive representative under ORS 243.666(1).

Under IP 62, in contrast, the amount bargaining unit members can be required to pay as "payment-in-lieu-of dues" is identical to "dues" and is an amount even lower than that which can currently be charged to fair share payers. That is the case because under IP 62, Sections 5(1) and 3(2)(a)-(b), unions may only "require as a condition of membership" that amount "necessarily and reasonably incurred for the purpose of representation and collective bargaining with their employer on matters concerning employment relations,"[2] and under ORS 243.650(18), "payment-in-lieu-of-dues" must be "equivalent to regular dues and assessments," subject only to the above First Amendment exception no longer applicable given the limited, narrow amount allowed to be collected.

Accordingly, under IP 62, non-members in the bargaining unit will be paying the only amount which can be "required as a condition of membership" by the union. Pursuant to IP 62, Section 5(2), therefore, they cannot be "denied" or otherwise asked to "waive" the

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[2] Because "employment relations" is defined by ORS 243.650(7) to cover only "mandatory subjects" of bargaining, under IP 62, unions lose their current ability to charge both members and non-members for their costs of representation on bargaining on "permissive subjects" of bargaining such as those referenced in ORS 243.650(7)(c)-(g).

following rights: (1) Section 3(2)(a)-(b)– the right to full membership status and participation in the union (whether or not acted upon) and (2) Section 3(2)(c)—the right to discontinue paying that amount "required as a condition of membership" at any time. Furthermore, because IP 62 does not change the union's ORS 243.672(2)(a) duty to represent fairly and not discriminate against any bargaining unit employee, a bargaining unit employee who exercises her IP 62, Section 3(2)(c) right to discontinue payment may not be denied all union negotiated wages, benefits, and other terms and conditions of employment in the collective bargaining agreement.

Thus, whether or not intended by the chief petitioners of IP 62, the collective operation of these provisions of IP 62 and the PECBA creates the classic "free-rider" problem—the right to union representation and union-negotiated wages, benefits, and terms and conditions of employment without payment—which this court has repeatedly made clear must be addressed in the caption. *See, e.g. Towers v. Rosenblum*, 354 Or 125, 310 P3d 136 (2013); *Sizemore v. Myers*, 342 Or 578, 157 P3d 188 (2007); *Crumpton v. Kulongoski*, 319 Or 82, 873 P2d 314 (1994); *Dale v. Kulongoski*, 321 Or 108, 894 P2d 462 (1995); *Sizemore v. Kulongoski*, 319 Or 82, 873 P2d 314 (1994).

In addition, the certified caption fails to capture fully the "membership changes" effected by the measure. As petitioners noted in their comments (Ex. C, pp. 7-8, 21-23), IP 62 makes significant changes to how public employee unions conduct their internal affairs. It not only dictates what these unions can charge as dues (Sections 5(1) and 3(2)(a)-(b)), but also grants all bargaining unit employees full participation in union activities and expenses (Section 2(2)(b)), and even circumscribes how unions may collect

purely voluntary contributions (Section 6). The certified caption wastes thirteen words to cover only the first of these unprecedented changes—*i.e.,* the limitation on costs. It is possible, however, to cover all the changes using fewer words such as "changes membership."

In fact, it is possible to cover all the actual major effects of the measure--free rider, membership changes, and new enforcement scheme--within the word limitations for the caption as follows: "Allows public employees to receive union representation without paying costs, changes membership, authorizes lawsuits." Petitioners respectfully request, therefore, that the court refer the caption back to the Attorney General for modification.

III. Result Statements.

ORS 250.035(2)(b)-(c) require that a ballot title contain a simple understandable statement of not more than 25 words that describes the result if the state measure is approved or rejected. Typically, the "yes" vote result statement builds on the caption. The purpose of the "yes" vote result statement is to "notify petition signers and voters of the result or results of enactment that would have the greatest importance to the people of Oregon." *Novick v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). In contrast, the "no" vote result statement must explain to voters "the state of affairs" that will exist if this initiative is rejected, that is, the *status quo*. It is also essential that the law described in the "no" vote result statement concern the subject matter of the proposal. Otherwise, the description could mislead voters about the effect of their vote. *Nesbitt v. Myers*, 335 Or 219, 223, 64 P3d 1133 (2003). *See also*, *Nesbitt v. Myers*, 335 Or 424, 431, 71 P3d 530 (2003)(review of modified ballot title). "[T]o comply with [***] statutory requirements, the Attorney General may have to go beyond the words of a measure in order to give the

voters accurate and neutral information about a proposed measure." *Caruthers v. Myers*, 344 Or 596, 601, 189 P3d 1 (2008).

Here, the Attorney General certified the following result statements:

> **Result of "Yes" Vote:** "Yes" vote prohibits public employee union from requiring dues/fees for union activities unrelated to limited representation/bargaining; employee may authorize additional payments. Authorizes lawsuits.
>
> **Result of "No" Vote:** "No" vote retains ability of public employee unions to require dues/fees for all union representation/bargaining activities, require member dues for other union activities.

These result statements also fail to comply with the statute. The certified "yes" vote result statement suffers from the same deficiencies noted above for the "caption"—it fails to address the "free-rider" and "membership" changes. The Attorney General rejected petitioners' comments regarding those deficiencies in the "yes" vote result statement (Ex. C, pp. 12, 26-27) without much explanation (Ex. D, p. 7) but presumably for the same reasons she articulated for the caption. Accordingly, Petitioners incorporate by this reference their arguments above regarding the caption.

In addition, the "no" vote result statement continues to be an inaccurate statement of the current law. As petitioners explained in their comments and above, under current law, unions set the terms of membership, including dues, and can negotiate "fair share agreements" to collect amounts related to contract negotiations and administration from non-members. Ex. C, pp. 14, 26-27. The PECBA grants represented employees the right to revoke the authority of the union to enter into such agreements (ORS 243.650(10); OAR 115-030-0000) and not make other payments required of members (*see supra* n.2). The "no" vote result statement fails to make this aspect of current law clear.

These deficiencies in the certified "yes" and "no" vote result statements can be addressed within the word limitations as follows:

> **Result of "Yes" Vote:** "Yes" vote allows public employees to benefit from union representation without paying costs; prohibits other payroll deductions without authorization; changes union membership rules; authorizes lawsuits.
>
> **Result of "No" Vote:** "No" vote retains current law allowing negotiated agreements requiring union-represented public employees to share representation costs, but not other expenditures; union set membership terms.

Therefore, Petitioners respectfully request that the certified result statements be referred back to the Attorney General for modifications

IV. Summary

ORS 250.035(2)(d) requires that the ballot title contain a 125 word summary which accurately and impartially summarizes the measure and its major effects, with the goal of providing 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).

Here, the Attorney General certified the following summary:

> **Summary:** Currently, public employees in a bargaining unit may be represented by a union. Union may require dues from its members to fund expenditures related to all bargaining/ representation and other union activities. Collective bargaining agreements can require represented nonmembers to pay fees, but nonmembers cannot be required to pay fees for union activities unrelated to bargaining/representation. Measure prohibits requiring any dues/fees that fund activities other than union bargaining/representation concerning "employment relations" (defined). "Employment relations" includes all subjects on which unions, employers must bargain, but not all subjects on which they are allowed to bargain. Measure permits union to separately collect itemized payments for other representation/bargaining activities, and other union activities from employee who authorizes additional amounts. Authorizes enforcement lawsuits. Other provisions.

The summary does a better job of highlighting some of the changes discussed above, but still fails to address others, such as the "free rider" problem and the full extent of "membership changes" and the new enforcement scheme remedies. In the cases cited above, however, this court has explained that if a measure creates a "free-rider" effect or provides significant new enforcements schemes/remedies, these issues must be addressed throughout the ballot title. Petitioners incorporate by this reference their arguments above and submit that the following alternative would address that deficiency:

> **Summary:** Current law allows public employees to bargain collectively; union must fairly represent all employees in bargaining unit (in negotiations and contract enforcement), regardless of union membership; allows collective bargaining agreements authorizing payroll deductions for member dues, nonmember payments-in-lieu-of-dues; employees can be required through collective bargaining agreement to share costs of legally required union representation, but not other union expenditures; union sets membership terms. Measure only permits negotiated agreements to collect money for certain representation activities; requires prescribed authorization to collect money for other purposes; limits certain legislative amendments (effect unclear). Union must accept as member any employee who pays "representation costs" (as defined); cannot require additional payments. Employees can withdraw membership, union payments, and still receive union representation. Authorizes lawsuits, damages, attorney fees. Other changes.

CONCLUSION

For the reasons stated above, the certified ballot title fails to substantially comply with the statute. Therefore, the court should certify the alternative language proposed by petitioners, or else refer the ballot title back to the Attorney General for modification.

DATED December 15, 2015.

Respectfully Submitted,
BENNETT, HARTMAN, MORRIS & KAPLAN, LLP
s/Aruna A. Masih
Aruna A. Masih, OSB #973241
of Attorneys for Petitioners

Section 1. Title

This 2016 Act shall be known as the "No Politics From My Pay, Without My Say" Act.

Section 2. Findings

The people of Oregon find that:

(1) It is important to protect the free speech and association rights of individual public employees.

(2) The right of public employees in a bargaining unit to fully participate in collective bargaining activities with their employer, historically, has been conditioned upon becoming a member of a labor organization. The recognition of a labor organization as the exclusive representative of all public employees within a bargaining unit has inadvertently enabled labor organizations to compel public employees to financially support political and ideological activities unrelated to collective bargaining as a condition of membership.

(3) The people have determined there is a compelling governmental interest in ensuring that no public employee should be required to financially support political or ideological activities or expenditures of a labor organization that are not related to collective bargaining with their employer in order to exercise their right to join and participate in collective bargaining activities through an exclusive representative on matters concerning employment relations.

Section 3. ORS 243.662 is amended to read:

243.662 Rights of public employees to join labor organizations. (1) Public employees have the right to form, join and participate in the activities of

labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations.

(2) Each individual public employee within an appropriate bargaining unit has the following rights:

(a) The right to refrain from financially supporting or subsidizing any political or ideological activity or any expenditure by or through an exclusive representative that is not necessarily or reasonably incurred for the purpose of representation and collective bargaining with their employer on matters concerning employment relations.

(b) The right to join and participate as a member in all activities and expenditures of an exclusive representative that are necessarily or reasonably incurred for the purpose of representation and collective bargaining with their employer on matters concerning employment relations without having that right conditioned upon the payment of member dues, or other money, that may be used by the exclusive representative to financially support, or subsidize, any political or ideological activity or expenditure that is not necessarily or reasonably incurred for the purpose of representation and collective bargaining with their employer on matters concerning employment relations.

(c) The right to cancel membership in a labor organization recognized as an exclusive representative, and discontinue paying all member dues or other money required as a condition of membership, at any time.

Section 4. ORS 243.666 is amended to read:

243.666 Certified or recognized labor organization as exclusive employee group representative; protection of employee nonassociation rights. (1) A labor organization certified by the Employment Relations Board or

recognized by the public employer is the exclusive representative of the employees of a public employer for the purposes of collective bargaining with respect to employment relations. **No labor organization may be certified to serve as an exclusive representative by the Employment Relations Board unless it offers a membership structure that protects the rights of individual public employees under ORS 243.662(2).** Nevertheless any agreements entered into involving union security including an all-union agreement or agency shop agreement must safeguard the rights of nonassociation of employees, based on bona fide religious tenets or teachings of a church or religious body of which such employee is a member. Such employee shall pay an amount of money equivalent to regular union dues and initiation fees and assessments, if any, to a nonreligious charity or to another charitable organization mutually agreed upon by the employee affected and the representative of the labor organization to which such employee would otherwise be required to pay dues. The employee shall furnish written proof to the employer of the employee that this has been done.

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

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

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

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

Section 5. **Violation of public employee's individual rights**

(1) An exclusive representative violates a public employee's rights under ORS 243.662 if it compels any public employee to pay member dues or other money as a condition of joining and participating as a member in the representation and collective bargaining activities of the labor organization if any portion of those dues may be used by the labor organization to pay for, or subsidize, political or ideological activities or any expenditures that are not necessarily and reasonably incurred for the purpose of representation and collective bargaining with the employee's public employer on matters concerning employment relations.

(2) An exclusive representative violates a public employee's rights under ORS 243.622 if it denies a public employee's exercise of any of his or her rights thereunder or conditions a public employee's membership in the labor organization upon the public employee's waiver of rights thereunder.

Section 6. **Savings Clause**

(1) An exclusive representative does not violate a public employee's individual rights under ORS 243.662 by engaging in otherwise lawful political or ideological activities or expenditures that are not necessarily or reasonably incurred for the purpose of collective bargaining with a public employee's employer on matters concerning employment relations and financing those activities with voluntary dues, fees, or other money that are:

(a) Separately deducted and itemized by a public employer pursuant to ORS 652.610,

(b) Additional to any other member dues or other money a public employee is required to pay to the labor organization as a condition of joining and participating as a member in all activities of the labor organization that are necessarily and reasonably incurred for the

purpose of representation and collective bargaining with their employer on matters concerning employment relations, and

(c) Obtained with the public employee's affirmative written consent as provided in subsection (3) of this section.

(2) An exclusive representative does not violate a public employee's individual rights under ORS 243.662 by making an expenditure that is not necessarily or reasonably incurred for the purpose of representation and collectively bargaining with their employer on matters concerning employment relations by providing, purchasing or contracting with third-parties to provide additional incidental member benefits so long as any such member benefits are designed to inure to the benefit of individual members, do not involve political or ideological activities, and are not provided at a cost exceeding fair-market value.

(3) The written consent described in subsection (1) of this section shall be on a form provided by the Employment Relations Board for the sole purpose of documenting the public employee's consent to allowing a specified amount of money to be voluntarily collected from the public employee's wages or salary and paid to the labor organization to be used for political and ideological activities or expenditures not directly related to collective bargaining with their employer. The form provided by the Employment Relations Board shall comply with the following additional requirements:

(a) The form's title shall read, in at least 18-point bold type:

> **"Voluntary Consent To Payment Of Additional Dues, Fees, Or Other Money For Political Or Ideological Purposes Not Directly Related To Collective Bargaining With My Employer."**

(b) The form shall state, immediately above the signature line:

"By signing this form you are voluntarily agreeing to pay money to [insert name of labor organization] for political or ideological purposes not directly related to collective bargaining and contract enforcement with your employer. You are not obligated to sign this authorization and may revoke this authorization at any time. Your signature below is completely voluntary and cannot in any way affect your employment or your right to join and participate as a represented member of [insert name of labor organization] in collective bargaining with your employer.

Section 7. Private Right of Action To Enforce Rights Of Individual Public Employees

(1) Every public employee within an appropriate bargaining unit represented by an exclusive representative shall have the right to commence a civil action in any circuit court of this state where the exclusive representative has members to enforce the rights recognized by this 2016 Act. In such an action, a court may grant injunctive and other equitable relief as well as actual damages. A prevailing public employee shall be entitled to award of reasonable costs and attorney fees.

Section 8. Definitions and Interpretation

(1) As used in Sections 1-9 of this 2016 Act, the terms "appropriate bargaining unit," "collective bargaining," "employment relations," "exclusive representative," "labor organization," "public employee," and "public employer" shall have the meanings provided in ORS 243.650 (2015). The meaning of these terms shall not be altered or changed by any amendment to ORS 243.650 (2015) unless the amendment to ORS 243.650 (2015) has been submitted to the people for approval or rejection at a statewide election presented with neutral ballot title language drafted by the Attorney General.

(2) The phrase "necessarily and reasonably incurred for the purpose of representation and collective bargaining" is a term of legal art intended to refer, depending on context, to activities and expenditures that either are or are not germane to collective bargaining.

(3) If any provision of this 2016 Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this 2016 Act are severable.

(4) This 2016 Act supersedes any statute or subordinate law with which it conflicts. After the passage of this 2016 Act, no person or entity may act as the exclusive representative of an appropriate bargaining unit in contract negotiations with a public employer unless it guarantees the rights secured by ORS 243.662 to all members of the appropriate bargaining unit. This Act shall not be interpreted to impair the obligation of any contract in existence prior to its passage and shall be construed consistently with the state and federal constitutions.

<u>Section 9</u>. Effective Date

(1) This Act shall be included and made a part of ORS 243.650 to 243.782 and takes effect on passage.

OFFICE OF THE SECRETARY OF STATE

JEANNE P. ATKINS
SECRETARY OF STATE

ROBERT TAYLOR
DEPUTY SECRETARY OF STATE

ELECTIONS DIVISION

JIM WILLIAMS
DIRECTOR

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SALEM, OREGON 97310-0722

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INITIATIVE PETITION

TO: All Interested Parties

FROM: Lydia Plukchi, Compliance Specialist

DATE: October 29, 2015

SUBJECT: Initiative Petition **2016-062** Draft Ballot Title

The Elections Division received a draft ballot title from the Attorney General on October 29, 2015, for Initiative Petition **2016-062**, proposed for the November 8, 2016, General Election.

Caption

Public employee union cannot collect dues for uses other than representation, bargaining without member authorization

Chief Petitioners

Maggie Neel PO Box 2111 Lebanon, OR 97355
Mike Forest PO Box 7524 Salem, OR 97303

Comments

Written comments concerning the legal sufficiency of the draft ballot title may be submitted to the Elections Division. Comments will be delivered to the Attorney General for consideration when certifying the ballot title.

Additionally, the Secretary of State is seeking public input on whether the petition complies with the procedural constitutional requirements established in the Oregon Constitution for initiative petitions. The Secretary will review any procedural constitutional comments received by the deadline and make a determination whether the petition complies with constitutional requirements.

To be considered, draft ballot title comments and procedural constitutional requirement comments must be received in their entirety by the Elections Division no later than 5 pm:

Comments Due	How to Submit	Where to Submit
November 13, 2015	Scan and Email	irrlistnotifier.sos@state.or.us
	Fax	503.373.7414
	Mail	255 Capitol St NE Ste 501, Salem OR 97310

ELLEN F. ROSENBLUM
Attorney General

FREDERICK M. BOSS
Deputy Attorney General

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

October 29, 2015

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

Re: Proposed Initiative Petition — Public Employee Union Cannot Collect Dues for Uses Other Than Representation, Bargaining Without Member Authorization
DOJ File #BT-62-15; Elections Division #2016-062

Dear Mr. Williams:

We have prepared and hereby provide to you a draft ballot title for the above-referenced prospective initiative petition. The proposed measure relates to prohibiting public employee unions from collecting dues for uses other than representation or bargaining without the authorization of members.

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.

Alicia Thomas
Legal Secretary

AFT/6894662

Enclosure

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SECRETARY OF STATE

DRAFT BALLOT TITLE

Public employee union cannot collect dues for uses other than representation, bargaining without member authorization

Result of "Yes" Vote: "Yes" vote prohibits public employee union from collecting dues from any member to fund activities unrelated to representation or collective bargaining, unless authorized by member.

Result of "No" Vote: "No" vote retains existing ability of public employee unions to collect dues from members for union purposes not directly related to representation or collective bargaining.

Summary: Currently, the Employment Relations Board may certify, or a public employer may recognize, a union as the "exclusive representative" of all employees in an appropriate bargaining unit of public employees. A union may use member dues for some costs unrelated to bargaining or representation. Payments nonmembers are required to make may be used only for costs related to bargaining or representation. Measure provides that Board cannot certify union as "exclusive representative" if it requires its members to make contributions that are spent on activities "not necessarily and reasonably incurred for the purpose of representation and collective bargaining." Measure permits union to separately collect itemized dues for activities unrelated to representation, collective bargaining only from its members who consent in writing to additional contributions. Other provisions.

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November 13, 2015

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SECRETARY OF STATE

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

The Honorable Jeanne Atkins
Secretary of State Elections Division
255 Capital Street NE, Suite 501
Salem, Oregon 97310-0722

Re. Initiative Petition 36 (2014) - Draft Ballot Title Comments
Our File No. 18600-33

Dear Secretary Atkins:

This office represents Hanna Vaandering and Trent Lutz, Oregon electors who wish to comment on IP 62 (2015). Ms. Vaandering is the President of the Oregon Education Association and Mr. Lutz is the Acting Executive Director of Public Affairs.

1. INTRODUCTION

In a state where public policies are often debated through the initiative process, the validity of unions has drawn a disproportionate share of attention. Anti-union measures have ranged from attacks on the use of payroll deductions to proposals purporting to "protect the right" of employees to not support the union. Notwithstanding these lofty statements, a common goal is to deplete union treasuries by allowing employees to receive union representation without sharing in the cost of that representation – i.e., they create "free riders." IP 62 is no exception. As discussed below, because the proposal allows employees to stop paying for representation at any time, without otherwise changing the union's duty to fairly represent all bargaining unit members, IP 62 allows "free riders." Under well-established Supreme Court precedent, this means that the ballot title must alert voters to this actual effect. *Towers v. Rosenblum*, 364 Or 125, 310 P3d 136 (2013), *Sizemore v. Myers*, 342 Or 578, 157 P3d 188 (2007); *Crumpton v. Kulongoski*, 319 Or 83, 873 P2d 314 (1994), *Dale v. Kulongoski*, 321 Or 108, 894 P2d 462 (1995), *Sizemore v. Kulongoski*, 319 Or 82, 873 P2d 314 (1994).

Unfortunately, the draft ballot title does not capture the free rider issue or otherwise accurately describe how the measure works. This is not surprising. Proponents often craft initiatives that appear to have one simple subject, such as "the right to not join or support a union," or "the right to represent oneself" that is then reflected in the draft ballot title. But the initiatives are neither as simple nor clear as they seem, which means that ballot titles that focus on surface changes are modified substantially based on the actual effect of a proposal in light of complex and interrelated laws governing collective bargaining. *See, e.g.* IP 35 (2016) (draft ballot stated unequivocally that union would not be required to represent nonmembers; certified ballot title substantially revised after commenters explained that Oregon's law banning discrimination based on union membership would necessarily mean that nonmembers be paid the same as members.); *see also,* IP 9 (2014) (certified ballot title incorrectly focused exclusively on the ban on requiring employees to pay any money to the union, without explaining that these employees would still receive the benefit of representation for free. *Towers v. Rosenblum, supra.).*

Below, commenters will first describe relevant current law and then describe how the proposal changes that law. They will then turn to the specific concerns with the draft ballot title.

2. CURRENT LEGAL FRAMEWORK

Oregon's Public Employee Collective Bargaining Act (the PECBA) was enacted in 1973. ORS 243.650 *et seq* . Like its federal counterpart in the National Labor Relations Act ("NLRA"), the PECBA establishes a complex system under which employees can elect to have a union represent them. The Oregon Employment Relations Board ("ERB") is responsible for enforcing the PECBA, through both rulemaking and contested case proceedings. ORS 243.766.

A. Appropriate Bargaining Unit

The first step in the process is for a union to be certified as the exclusive bargaining representative of an "appropriate bargaining unit" of employees. The statute gives ERB the authority to define the appropriate bargaining unit. ORS 243.682. In making that determination, ERB considers a variety of factors, including "community of interest, wages, hours, working conditions of the employees involved, history of collective bargaining and the desires of employees. ORS 243.682; OAR 115-025-0050(1) (further defining "community of interest" to include "similarity of duties, skills, benefits, interchange or transfer of employees, promotional ladders, common supervisor, etc."). Typically, the scope of the bargaining unit is defined primarily by job classifications. Status as a full-time or temporary employee is another common distinguishing factor. *Id.; See also, Labor and Employment Law: Public Section,* OSB CLE 2011, Chapter 3. As discussed below, under well-established law, an employee cannot be required to join the union, but employees whose positions are within the bargaining unit

remain bargaining unit members even if they choose not to join. These employees are often referred to as "covered employees" and are typically required to pay dues or "payments-in-lieu-of-dues," commonly known as "fair share" fees. *See,* ORS 243.650(10) and (18).

B. Union's Duties as Exclusive Bargaining Representative

Once the appropriate bargaining unit is defined and a majority of the employees in that unit chose to be represented, the law imposes a number of rights and responsibilities on both the union and the employer. First, the union becomes the exclusive bargaining representative for all employees in the unit. *Carlson v. AFSCME,* 73 Or App 755, 758, 700 P2d 260, *rev. den.* 300 Or 332 (1985). In that capacity, it must fairly represent all members of the bargaining unit without hostility or discrimination, regardless of union membership. Often referred to as the "duty of fair representation," this duty is grounded in ORS 243.672(2)(a), which makes it unlawful for a union to "interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under ORS 243.650 to 243.782." *Putvinskas v. SWOCC Classified Federation, AFT and SWOCC,* 18 PECBR 882, 894 (2000); *See also, Vaca v. Sipes,* 396 US 171, 64 LRRM 2369 (1967) and *Airline Pilots v. O'Neill,* 499 US 65, 136 LRRM 2721 (1991). The right to choose whether or not to join the union is a core protected right under both constitutional and statutory labor law principals. U.S. Const., Am. 1; ORS 243.662; *see also, Sizemore v. Myers/Terhune, supra; Dale v. Kulongoski, supra.* The duty applies to representation for both negotiations and contract enforcement and exists independently of any desire by a bargaining unit member to receive representation.

C. Fair Share Agreements

Because the law places significant duties on unions towards all bargaining unit members, the PECBA allows public employee unions to negotiate provisions in collective bargaining agreements to require all covered employees to pay their fair share of representation costs. ORS 243.666. Under a "fair share agreement," union members pay dues, non-union members pay fees-in-lieu-of-dues. ORS 243.650(10) and (18).[1] These agreements are allowed in order to avoid the "free rider" problem. *See,* Hardin, *The Developing Labor Law,* 3rd Ed. (1992), Chapter 26 and cases cited therein. As the U.S. Supreme Court explained in the leading case on the subject:

> The designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of

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

> much time and money. The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required. Moreover, in carrying out these duties, the union is obliged "fairly and equitably to represent all employees, . . . union and non-union," within the relevant unit. *A union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become "free riders" – to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees.*

Abood v. Detroit Board of Education, 431 U.S. 209, 97 S. Ct. 1782, 52 L.Ed.2d 261, 95 LRRM 2411, (1977) (Citations omitted, emphasis added.)

To ensure that employees are not required to pay for political or ideological activities to which they may have objections, the law requires all unions to follow a specific and detailed procedure that allows non-members to refuse to pay for expenses that are not germane to or supportive of the negotiations and contract enforcement. *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Elvin v. OPEU*, 11 PECBR 9 (1988), *aff'd*, 102 Or App 159 (1990), *aff'd*, 313 Or 165 (1992). Expenditures that relate to representation are deemed "chargeable" and all other expenditures are deemed "non-chargeable" and therefore cannot be collected over an employee's objection. *Carlson v. AFSCME*, 73 Or App 755, 761, 700 P2d 260 (1985); *Ebersole v. Mollala Education Ass'n/OEA/NEA*, 15 PECBR 160, 179 (1994). The Employment Relations Board is charged with determining whether a challenged expenditure is "chargeable" or "nonchargeable."

D. Union Membership Status

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

E. Employer's Duties to Not Treat Bargaining Unit Members Differently Based on Union Activity or Status

The PECBA also imposes significant obligations on employers once a union is recognized. In addition to the key obligation to bargain in good faith,[2] the PECBA prohibits differential treatment of employees based on protected union activity. ORS 243.672(1)(a),(b) and (c). *See, Labor and Employment Law: Public Sector*, OSB CLE 2011, Chapter 8 for overview of union anti-discrimination laws. While most cases challenge detrimental or adverse action by the employer, promises of favoritism can also be unlawful. *ONA v. OHSU*, 19 PECBR 590, 594 (2002). This means that, irrespective of the union's duty of fair representation, the public employer is required to pay nonunion members the same wages, salaries and other employment benefits as union members, typically those negotiated in the applicable collective bargaining agreement.

F. Enforcement of PECBA

Under current law, the Employment Relations Board has exclusive jurisdiction over all public sector labor law disputes that involve interpreting the PECBA. *Ahern v. Oregon Public Employees Association*, 329 Or 428, 988 P2d 364 (1999). As the court explained in *Ahern*, exclusive jurisdiction is necessary to avoid inconsistent results. Allegations that either an employer or union has violated the terms of the statute must be pursued as unfair labor practices.[3] ORS 243.672(1) and (2). This would include allegations that a union has violated its duty of fair representation, for example, by failing to pursue grievances or bargain adequate employment terms. If ERB finds a violation, it can grant "affirmative relief," such as an order requiring that

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[2] One of the bedrock principals of the PECBA is that both the employer and union have an obligation to "bargain in good faith." ORS 243.656(5); ORS 243.672(1)(e) and ORS 243.672(2)(b). In determining the scope of that obligation, ERB has generally followed federal law and distinguished between "mandatory," "permissive" and "prohibited" subjects of bargaining. Mandatory subjects are those defined as "employment relations" under ORS 243.650(7): "direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment." Whether a subject falls within the definition (i.e., is a "condition of employment") is the source of extensive litigation. In lay person's terms, the focus is on whether the subject of the proposal impacts management prerogatives more than the employee's conditions of employment. If a subject is "permissive," an employer may still discuss it with the union, but is not required to do so. Common examples of permissive subjects that are negotiated include standards for evaluations, ground rules for bargaining, and assignment of duties. If a proposal is inconsistent with a law, then it is "prohibited" and cannot be the subject of bargaining. *See, Labor and Employment Law: Public Section*, OSB CLE 2011, Chapter 6.3 for more complete discussion of subjects of bargaining. Whether an expenditure is "chargeable" to fair share fee payers does not turn on whether a representation activity concerns a mandatory subject of bargaining. *See, Ebersole, supra.*, 15 PECBR 15 183.

[3] The only time an employer may go to court instead of ERB is if a strike "creates a clear and present danger or threat to the health, safety or welfare of the public." ORS 243.726(3). Commenters are aware of only one time this has occurred. *See* https://olis.leg.state.or.us/liz/2013R1/Downloads/CommitteeMeetingDocument/7509; http://www.oregonlive.com/business/index.ssf/2012/11/judge_declines_to_forbid_longs.html

the violation cease and the employee made whole. In addition, ERB has authority to award limited representation costs and attorney fees to the prevailing party before ERB and on appeal. ORS 243.676; OAR 115-035-0055 and 0057. In exceptional circumstances, ERB may issue a "civil penalty" of up to $1000 and award higher representation costs/attorney fees. ORS 243.676; OAR 115-35-0075; OAR 115-35-0055(a) and 115-35-0057(c). ERB's jurisdiction includes resolving questions about whether a particular expenditure is "chargeable," *i.e.*, "necessarily or reasonably incurred for the purpose of representation and collective bargaining. *See, e.g. Ebersole v. Mollala Education Assn/OEA/NEA, supra.*

Because of ERB's exclusive jurisdiction, there are no existing causes of action that can be filed in circuit court, nor any right to damages.

3. **CHANGES MADE BY IP 62**

A. Limits Fair Share Agreements and Allows Free Riders

To understand IP 62's actual effect, it is important to highlight what IP 62 does and does not change. First and foremost, IP 62 does not change any of the provisions relating to non-discrimination and the duty to represent; the union remains obligated to represent all covered employees in the bargaining unit. IP 62 does change, however, what the union can charge covered employees for that representation or membership dues. It also grants covered employees the absolute right to withdraw payment of even those limited costs and dues at any time. The combination of these provisions results in the classic free rider problem as follows.

Under IP 62 Section 5(1), public employee unions are prohibited from compelling "any public employee to pay member dues or other money as a condition of joining and participating as a member in the representation and collective bargaining activities of the labor organization if any portion of those dues may be used by the labor organization to pay for, or subsidize, political or ideological activities or any expenditures that are not necessarily and reasonably incurred for the purpose of representation and collective bargaining with the employee's public employer on matters concerning employment relations." Section 3(2)(a)and (b), in turn, grant public employees the right to make only such limited payments and still join and fully participate in the union. By definition, therefore, under IP 62, a union cannot condition membership on the payment of any money other than limited representation costs (as defined). Finally, Section 3(2)(c) grants individual public employees "[t]he right to cancel membership in a labor organization recognized as an exclusive representative, and discontinue paying all member dues or other money required as a condition of membership, at any time." And, because that right must be protected (Sections 4(1) and 5(2)) and the union's obligation to represent and not discriminate remains (ORS 243.672(2)(a)), any covered employee who withdraws support will still be entitled to receive all of the wages, benefits and other terms and

conditions of employment that are set out in the collective bargaining agreement—*i.e.*, the right to be a free-rider.

So, for example, although a school district and a union could agree in their collective bargaining agreement to deduct from the paychecks of all bargaining unit members the limited representation costs (as defined) by Sections 5 and 3(2)(a) and (b), any teacher covered by that contract could at any time exercise her right under Section 3(2)(c) to stop making those payments. In that event, neither the school district nor the union could deny the teacher all the other wages and benefits owed to covered employees under the contract. In fact, to try to bargain around that right is expressly prohibited. Sections 4(1) and 5(2).

The free rider problem is further exacerbated by the fact that to the extent IP 62 authorizes agreements to deduct some money to cover certain union bargaining and representation expenditures, the scope of permissible expenditures is arguably much more limited than what has historically been deemed "chargeable" under "fair share agreements." This is because IP 62 only permits agreements that cover representation and collective bargaining expenditures *on matters concerning employment relations.*" (Emphasis added).[4] "Employment relations," in turn, only refers to "mandatory" subjects of bargaining. Currently, collective bargaining can and often does extend to permissive issues and expenditures related to those activities are deemed chargeable. But under IP 62, a public employee union would arguably be prohibited from spending money on bargaining permissive items or enforcing any agreements regarding a permissive item. Section 5.

In sum, while it may be lawful for a public employer and union to enter agreements *authorizing* payroll deductions, they may only do so to cover these more limited "representation" costs, and those agreements can be trumped at any time by an employee who says "I don't want to pay." This makes it possible for any covered employee to be a "free rider" at any time. As discussed below, the ballot title must make that clear.

B. Union Membership

IP 62 gives all covered employees the right to be a union member if they pay for representation, as discussed above. That is, under section 2(3)(b) and section 5(1), a union cannot condition membership on the payment of any money other than expenditures that are "necessarily or reasonably incurred for the purpose of representation and collective bargaining

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[4] The scope of permissible "representation costs" under IP 62 is further confused by the definition of the phrase "necessarily and reasonably incurred for the purpose of representation and collective bargaining" set out in Section 8(2). That section states that the phrase "is a term of legal are intended to refer, depending on context, to activities and expenditures that *either are or are not* germane to collective bargaining." (Emphasis added). That is a singularly unhelpful definition that muddies the actual effect of the proposal even more.

with their employer on matters concerning employment relations." In addition, such members have the right to participate in any activity related to representation, such as voting for union officers or ratifying a contract. This provision infringes on the well-established principal that private membership associations have a constitutional right under the First Amendment to set their own membership terms. *See, e.g. United Mine Workers v. Illinois Bar Ass'n*, 389 US 212, 223-25 (1967) (affirming right of labor union to provide legal services relating to workers compensation claims to members under First Amendment, explaining "[w]e have therefore repeatedly held that laws which actually affect the exercise of these vital rights [of association, assembly and speech] cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil.").

C. Individual Authorization for "Non-Chargeable" Expenditures

Section 6 requires unions to obtain individual written consent on a prescribed form in order to collect any money from a covered employee other than for the costs of representation relating to employment relations, as discussed above.

D. Enforcement

Section 7 creates an entirely new right of action in circuit court authorizing any bargaining unit member to sue the union to enforce the provisions of the measure without demonstrating injury. The court may award damages as well as equitable relief, and is required to award attorney fees and costs to a "prevailing" public employee. The statute thus divests the Employment Relations Board of its exclusive jurisdiction to decide such matters as whether a disputed subject is germane to collective bargaining over a mandatory subject of bargaining. This represents a significant departure from current law, which the Supreme Court has expressly held bars actions in civil courts that might require interpretation of the PECBA. *Ahern, supra.* at 436-437.

E. Miscellaneous

Section 8 expresses an intent to enshrine existing definitions of key labor law terms in statute, unless they are amended by a vote of the people. Of course, because IP 62 purports to be a statutory initiative, this kind of limitation on legislative authority is unconstitutional and unenforceable. The legislature retains authority to amend any statute. *See, e.g. Macpherson v. Department of Administrative Services*, 340 Or 117, 126 (2006). The inclusion of this language thus creates procedural constitutional problems which are addressed separately by comments submitted by Heather Conroy and incorporated by this reference.

4. DRAFT BALLOT TITLE

A. Caption

ORS 250.035(2)(a) provides that a ballot title contain "a [c]aption of not more than 15 words that reasonably identifies the subject matter of the state measure." The caption is the "headline" or "cornerstone for the other portions of the ballot title" and in order to comply with the statute, it must identify the proposal's subject matter in terms that will not "confuse or mislead potential petition signers and voters." *Kain/Waller v. Myers*, 337 Or 36, 40, 93 P3d 62 (2004) (quoting *Greene v. Kulongoski*, 322 Or 169, 174–75, 903 P2d 366 (1995)). As the court has emphasized, the "subject matter" is the "actual major effect" or effects of the measure. *Lavey v. Kroger*, 350 Or 559, 563, 285 P3d 1194 (2011). "To identify the 'actual major effect' of a measure, this court examines the text of the proposed measure to determine the changes that the proposed measure would enact in the context of existing law and then examines the caption to determine whether the caption reasonably identifies those effects." *Rasmussen v. Kroger*, 350 Or 281, 285, 253 P3d 1031 (2011).

The Attorney General issued the following draft ballot title:

> Public employee union cannot collect dues for uses other than representation, bargaining without member authorization.

This caption is inaccurate and incomplete and must be substantially revised. The fundamental problem is that it fails to tell voters the "true subject" or "actual effect" of the proposal – to allow employees to receive the benefits of union representation without cost. This is a fatal flaw. The Oregon Supreme Court has directed the Attorney General to look behind the words of a measure to determine the proposal's "actual effect." *Rasmussen, supra.* More specifically, the court has repeatedly held that the caption for a measure that would allow free riders must identify that key major effect in order to comply with statutory standards, even when the proposal makes other changes. *See, e.g. Towers v. Rosenblum*, 364 Or 125, 310 P3d 136 (2013), *Sizemore v. Myers*, 342 Or 578, 157 P3d 188 (2007); *Crumpton v. Kulongoski*, 319 Or 83, 873 P2d 314 (1994), *Dale v. Kulongoski*, 321 Or 108, 894 P2d 462 (1995), *Sizemore v. Kulongoski*, 319 Or 82, 873 P2d 314 (1994).

Most recently, in *Towers v. Rosenblum*, the court reviewed a ballot title for IP 9 (2014) that failed to describe the free rider effect. The certified caption read, "Prohibits compulsory payment of union representation costs by public employees choosing not to join union." In that case, the Attorney General argued that her caption clearly identified the proposal's subject matter – the prohibition on requiring "payments-in-lieu-of-dues" – i.e., the facial changes made by the proposal. The court rejected that argument, emphasizing that prior decisions were clear that the Attorney General must examine the actual effect. The court explained:

> This case is controlled by our prior decisions in *Novick/Bosak* and *Sizemore/Terhune*. As in both of those cases, the measure at issue in this one would, if adopted, declare a right not to be required to join a labor organization as a condition of employment and a right not to pay dues, fees, or other charges to such labor organizations. As in both of those cases, an "actual major effect" is that employees who choose not to be represented will be able to receive services from a labor organization without having to pay for them. And, as in both of those cases, the Attorney General's certified ballot title caption is deficient for failing to identify that actual major effect.

Towers v. Rosenblum, 354 at 130-31.

The same analysis applies here. Section 3(2)(c) gives all covered the employees the right to not be a member or pay any money required to be a member – i.e. representation costs -- at any time. But the proposal does not otherwise change current law requiring unions to represent all bargaining unit members. Therefore, an "actual major effect" is that employees can, at any time, "receive services from a labor organization without having to pay for them." *Towers, supra.* The draft ballot title fails to identify that actual major effect and must therefore be revised.

The second major problem with the draft caption is that it fails to tell voters that the proposal creates a new right of action in circuit court to enforce the provisions of the proposal. The court has repeatedly held that voters should be informed of all significant changes in current law, including changes in enforcement schemes, where those changes are not "mere procedural details" but rather substantive. *Greenberg v. Myers*, 340 Or 65, 70, 127 P3d 1192 (2006); *Sizemore v. Myers/Terhune*, 342 Or at 587-588 ("We conclude that the extensive enforcement provisions in the proposed measure represent major changes in Oregon law that "likely would be significant to the voting public.") As in *Sizemore v. Myers/Terhune*, the remedial scheme established by IP 62 is new and fundamentally inconsistent with the current law and not "mere procedural detail." Currently, the Employment Relations Board has exclusive jurisdiction to interpret and enforce all disputes arising out of the PECBA. This rule ensures that decisions are made consistently and by a tribunal that has specialized knowledge of labor law. *Ahern, supra.* But under this proposal, circuit court judges are authorized to decide core questions of law, such as a whether an negotiation expenditure "concerns employment relations," and then award damages, injunctive relieve and mandatory prevailing plaintiff attorney fees. Accordingly, as the court directed in *Sizemore v. Myers/Terhune*, this new enforcement mechanism must be identified in the caption.

The third problem is that the reference to dues for "representation" is misleading. As discussed above, by limiting permissible expenditures to negotiations and collective bargaining *concerning employment relations*, IP 62 appears to prohibit the collection of fees for activities that have historically been considered "chargeable" expenditures related to negotiations and contract enforcement. For example, a teachers union might propose restricting the ability of employers to rely on student test scores in evaluations, an arguably permissive subject. Or it might seek arbitration over a dispute concerning class size, also an arguably permissive subject. Under IP 62, neither of those activities would be deemed "representation" activities, which renders the reference to "representation" misleading and overbroad.

Finally, the reference to "member" in the second clause is inaccurate. Under the proposal, a union can collect money from any covered employee for expenditures that are unrelated to representation (as defined), with authorization. Union membership is irrelevant. Section 7.

The following alternative corrects these deficiencies:

> Allows public employees to receive union representation without paying costs; authorizes lawsuits, attorney fees

This alternative plainly describes the most significant actual major changes made by the proposal in terms that will be readily understood. It tells voters that employees will be able to receive representation for free, and also alerts them to the new enforcement scheme. It is thus consistent with the court's decision in similar cases. *Towers v. Rosenblum, supra; Sizemore/Terhune v. Myers, supra.* As in those cases, other changes made the proposal are secondary and can be described in the remainder of the ballot title.

B. Result of "Yes" Vote

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

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

> **RESULT OF "YES" VOTE:** "Yes" vote prohibits public employee union from collecting dues from any member to fund activities

> unrelated to representation or collective bargaining, unless authorized by member."

This draft statement suffers from the same shortcomings as the caption. First, it fails to identify the free rider issue, which is one of the key results of passage and therefore must be identified for voters. Again, if an employee can choose to stop paying any money to the union at any time yet still receive representation (*i.e.* the negotiate employment terms and representation in contract disputes), he or she is a "free rider." Second, the unqualified reference to "representation" and "collective bargaining" is misleading, since the scope of those terms under IP 62 is narrower than what is commonly understood. Third, as with the caption, the draft statement conflates employee with member.

In addition, the draft "yes" vote result statement fails to mention changes that would be of significant importance to voters. This includes the failure to mention the change in membership rules, as well as the entirely new enforcement scheme.

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

> **RESULT OF "YES" VOTE:** "Yes" vote allows public employees to refuse to share cost of required union representation; prohibits other payroll deductions without authorization; changes membership rules; authorizes lawsuits.

This alternative identifies all of the major changes made by the proposal. It begins with a plain statement of the free rider issue that accurately reflects the fact that covered employees can at any time refuse to pay any money to the union. The next clause identifies the individual authorization requirement for certain other payroll deductions (those unrelated to representation and collective bargaining on matters concerning employment relations). We have used "other" in juxtaposition to "costs of union representation" to signal the broad category of payroll deductions for which authorization is required; an accurate and more detailed description is impossible within the word limits. On this point, it is important to note that any use of the terms "political" or "ideological" would be inaccurate and underinclusive. While the phrase has historically been used as shorthand for non-chargeable expenses, the requirement for separate authorization set out in Section 6 of IP 62 applies to a broad catchall category: every expenditure that is not "necessarily and reasonably incurred for the purpose of representation and collective bargaining on matters concerning employment relations" (with the exception of certain incidental member benefits). *See, Ebersole, supra,* 15 PECBR at 179 ("As used by the courts, the terms ["political" and "ideological"] have become a sort of generic umbrella encompassing all bases for objecting to the use of fair share fees for activities other than those germane to collective bargaining."). Under IP 62, this would include expenditures

such as charitable contributions and community service, as well as expenditures relating to representation activities concerning permissive subjects of bargaining.[5] None of those expenditures can reasonably be characterized as "political and ideological."

Finally, this alternative alerts voters to the fact that the proposal changes membership rules and authorizes an entirely new cause of action.

C. Result Of "No" Vote:

ORS 250.035(2)(c) requires that the ballot title contain a "simple and understandable statement" of up to 25 words, explaining "the state of affairs" that will exist if the initiative is rejected, that is, the *status quo*. It is also essential that the law described in the "no" vote result statement concern the subject matter of the proposal. Otherwise, the description could mislead voters about the effect of their vote. *Nesbitt v. Myers*, 335 Or 219, 223, 64 P3d 1133 (2003). Finally, it is generally impermissible for the "no" result statement to simply state that a "no" vote rejects the "yes" vote. *Nesbitt v. Myers*, 335 Or 424, 431, 71 P3d 530 (2003).

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

> **RESULT OF "NO" VOTE:** "No" vote retains existing ability of public employee union to collect dues from members for union purposes not directly related to representation or collective bargaining.

This statement is misleading and fails to describe the law most relevant to the *status quo*. First, as set forth above, current law authorizes agreements between a public employer and public employee union to collect dues or payments-in-lieu-of-dues from all covered employees (i.e., bargaining unit members). The union does not have the ability to collect dues unilaterally, as suggested by the draft "no" statement.

Second, under current law, covered employees cannot be required to pay for expenditures other than costs germane to negotiations and contract enforcement. IP 62 changes this law by only permitting "fair share" agreements to cover certain representation costs, but then authorizing employees to not even pay that amount. The proposal also requires specific authorization from members and nonmembers alike for any other payment to the union. The draft statement is inadequate and misleading in describing relevant current law on this point because it only references "members" and fails to describe the ability of public employers and

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[5] For a more detailed discussion of chargeable and nonchargeable expenses under current law see *Labor and Employment Law: Public Sector*, OSB CLE 2011, Chapter 10.2. For a listing of permissive subjects of bargaining see *Labor and Employment Law: Public Sector*, OSB CLE 2011, Chapter 6.3.

unions to negotiate agreements to require all employees to share in the costs of legally required union representation.

Finally, IP 62 prescribes union membership terms; unions cannot require the payment of money in addition to representation costs (as defined) as a condition of membership. Under current law, the union gets to set membership terms. That law should be referenced. We propose the following:

> **RESULT OF "NO" VOTE:** "No" vote retains current law allowing negotiated agreements requiring union-represented public employees to share representation costs, but not other expenditures; unions set membership terms.

D. Summary

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

The draft summary reads:

> **Summary:** Currently, the Employment Relations Board may certify, or a public employer may recognize, a union as the "exclusive representative" of all employees in an appropriate bargaining unit of public employees. A union may use member dues for some costs unrelated to bargaining or representation. Payments nonmembers are required to make may be used only for costs related to bargaining or representation. Measure provides that Board cannot certify union as "exclusive representative" if it requires it members to make contributions that are spent on activities "not necessarily and reasonably incurred for the purpose of representation and collective bargaining." Measure permits union to separately collect itemized dues for activities unrelated to representation, collective bargaining only from its members who consent in writing to additional contributions. Other provisions.

The draft summary fails to meet the statutory standards for the reasons discussed above. It does not adequately or accurately describe relevant current law, how the measure works or its major effects. More specifically:

- The first sentence, while accurate, spends too many words describing the "exclusive representative" status, which is unchanged by the proposal. It is also unnecessary and potentially misleading to call out the Employment Relations Board.
- The second sentence oversimplifies the dues/fees-in-lieu of dues structure. Under current law, a portion of both member dues and nonmember "fees-in-lieu-of-dues" can be spent on "nonchargeable" activities. However, nonmembers who object cannot be required to pay for anything other than chargeable expenditures. This sentence incorrectly focuses exclusively on members. The third sentence is accurate, but difficult to follow.
- The description of current law also needs to note that unions establish membership terms, so that voters will understand the significance of the changes made by IP 62.
- The description of the changes made by IP 62 set out in the fourth and fifth sentence are inadequate and inaccurate. It is unnecessary to reference certification by ERB to understand the breadth of the changes made. Word space can be saved by simply describing the changes. It is also unnecessary to quote the "necessarily and reasonably incurred" language in order to convey the gist of the proposal on this issue. This is particularly true given the bizarre and contradictory definition set out in section 8(2). Inclusion of the definition requires a statement that the effect is unclear.
- The last sentence inaccurately states that only "members" can authorize additional "dues" to the union. Payments above "representation" fees can be made by any employee, not just members. Moreover, such payments are not "dues," since membership dues are limited to representation costs (as defined).
- The summary impermissibly omits a description of other key changes made by IP 62. No mention is made of the fact that the proposal dictates membership terms (membership dues cannot be greater than the amount necessary to defray certain representation activities, with payment of that money entitling the employee to membership), or the fact that employees can stop paying that money at any time. It also makes no mention of the fact that the proposal creates an entirely new cause of action in circuit court, which is antithetical to the current enforcement scheme giving ERB exclusive jurisdiction to interpret the PECBA. Finally, it fails to reference the unconstitutional attempt to limit legislative authority. This change is significant and must be identified in the summary.

To correct these problems, we propose the following alternative:

> **Summary:** Current law allows public employees to bargain collectively; union must fairly represent all employees in bargaining unit (in negotiations and contract enforcement), regardless of union membership; allows collective bargaining agreements authorizing payroll deductions for member dues, nonmember payments-in-lieu-of-dues; employees can be required through collective bargaining agreement to share costs of legally required union representation, but not other union expenditures; union sets membership terms. Measure only permits negotiated agreements to collect money for certain representation activities; requires prescribed authorization to collect money for other purposes; limits certain legislative amendments (effect unclear). Union must accept as member any employee who pays "representation costs" (as defined); cannot require additional payments. Employees can withdraw membership, union payments, and still receive union representation. Authorizes lawsuits, damages, attorney fees. Other changes.

5. **CONCLUSION**

Commenters recognize that crafting accurate ballot titles in the short time frame available is extremely challenging, particularly with proposals such as IP 62 that are deceptively complicated, with effects that are not immediately apparent. Where, as here, one of those effects is to allow employees to receive the benefits of union representation for free, the Supreme Court has made clear that the caption and remainder of the ballot title must identify that effect. The draft ballot fails to do so. It must be revised to include the free rider concept and to correct the other identified inaccuracies.

Thank you for your careful consideration of these comments.

MSO:kaj
cc: Clients

November 13, 2015

By e-Mail to Irrlistnotifier.sos@state.or.us

The Honorable Jeanne Atkins
Secretary of State
Elections Division
255 Capital Street, N.E. Suite 501
Salem, Oregon 97310

Re: Initiative Petition 62 (2016)
Draft Ballot Title Comments

Dear Secretary Atkins:

I write as an elector in response to your Notice of October 29, 2015 inviting comments on the proposed ballot title for Initiative Petition 62 (2016); and seeking any additional comment "on whether the petition complies with the procedural constitutional requirement established in the Oregon Constitution for initiative petitions."

Initiative Petition 62 (IP 62) seeks to amend the Public Employee Collective Bargaining Act (PECBA),[1] Oregon's four decades old labor relations law for the public sector adopted to balance public employer-public employee interests and harmoniously stabilize public sector labor relations in public employment.

IP 62 is one of seven[2] initiative petitions filed to date for the 2016 election. Each addresses public employee collective bargaining reflecting a variety of schemes to eliminate authority to negotiate any provision obligating contributions by non-members to the costs of collective bargaining negotiations and contract administration, but allowing them to receive the terms and conditions of the contract.

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[1] ORS 243.650 *et seq*

[2] IP 32 (2016), "The Independent Public Protection Act."
IP 33 (2016), "Public Employee Choice Act."
IP 35 (2016), Public Employee Choice Act." Certified Title: "Only union public employees may benefit from union bargaining without sharing representation costs; modifies representation obligations."
IP 36 (2016), "Independent Public Employee Choice Act. Certified Title: "Only union public employees may benefit from union bargaining without sharing representation costs; modifies representation obligations." Confirmed by Oregon Supreme Court.
IP 61(2016), "No Politics from My Pay Without My Say." Prospective petition pending submission of minimum sponsorship signatures.
IP 69 (2016), "The Public Employee Choice Act." Prospective petition pending submission of minimum sponsorship signatures.

At the outset, I believe the Attorney General should not certify IP 62 for submission to the ballot for at least two reasons:

1. IP 62 intrudes and regulates the internal affairs of unincorporated associations (labor organizations). The governance and internal affairs of labor organizations, including membership, is well-recognized as a contract between the members and their organization. IP 62 commands that labor organizations alter this relationship to conform to the manner it describes. The Oregon Constitution forbids such intrusion and impairment of contracts.

2. IP 62 is submitted as a statutory proposal. It includes, however, a provision restricting the constitutional authority and power of the legislature to undertake and changes to certain provisions defined in the proposed measure. It includes an explicit requirement that any changes to a specific list of statutory terms require a statewide, public vote of the People, forbidding the Legislature from exercising its lawful constitutional authority to make, change and repeal laws. Limitations on Legislative powers cannot be made by statute.

Following is a more detailed examination of IP 62, the issues it addresses and underlying support for rejecting IP 62, or should it not be rejected, problems with the draft ballot title.

I. Background

A. Public Employee Collective Bargaining

The Pubic Employee Collective Bargaining Act (PECBA) was enacted in 1973. The Oregon Legislature has adopted, as it may for any statute, adjustments and changes to the law over its life.[3] Its core provision has remained in intact from the beginning. It establishes the right of public employees to designate union representation. Public employees have the right:

> "to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations.[4]

The law is administered by the Employment Relations Board (ERB). Its responsibilities and duties, as defined in ORS 243.766, generally are to investigate and resolve disputes over appropriate bargaining units, conduct representation elections; conduct proceedings on unfair labor practice complaints and take actions necessary for enforcement of its orders; conduct hearing and make inquiries necessary to carry out its duties and powers. Neither a public employer nor a labor organization may interfere with the right of any public employee to choose whether or not to exercise their right in ORS 243.672. Acts by a public employer that intrude on this right are categorized as unfair labor

[3] See, e.g., SB 750 (1995); HB 3342 (2013).
[4] ORS 243.662 "Rights of public employees to join labor organizations."

practices under ORS 243.672(1); and those by a labor organization are identified under ORS 243.672(2). Complaints of such acts are processed and orders may be issued by the ERB, which in turn may be appealed to the Oregon Court of Appeals.

The PECBA does not regulate the internal business, organizational affairs or membership of unions. The ERB in determining status as a labor organization, only examines whether the statutory definition under ORS 243.650 (13) of "labor organization" is met. It makes no inquiry or determination regarding the internal business, organizational affairs or membership in the organization

For employees desiring to exercise their statutory right, a first step generally is securing a definition and designation of an "appropriate bargaining unit." A bargaining unit is a grouping of employees by broadly common employment characteristics. These common characteristics are typically known as "community of interest." Community of interest is generally reflected by commonality of wages, hours, and terms and conditions such as education required for the work, and supervision. A labor organization that claims to represent a majority of employees (because they have individually designated it as their representative for purposes of collective bargaining) in an appropriate unit may request their public employer to voluntarily recognize and bargaining with the labor organization. Where there is not voluntary recognition because that representation is doubted or because, for example, the appropriate unit is not agreed, it is the responsibility of the ERB to determine the appropriate unit and supervise a secret ballot election.

Once majority representation is voluntarily recognized or certified by ERB a result of election or majority card check, the labor organization is designated the "exclusive representative"[5] of that unit of employees. IP 62 makes

The cornerstone right guaranteed in ORS 243.662 carries no requirement or obligation for any public employee to exercise such right. Exercise of the rights guaranteed under ORS 243.662 is not premised on membership status within the union seeking to represent an appropriate unit of employees. Any public employee may and can refrain from exercising that right. They may, in fact, fairly act in opposition to others seeking to exercise that right. Neither is there any obligation to become or remain a member to form a labor organization. There is no test of member/non-member status or commitment at any time in the representation process.

An exclusive representative, however, is required to represent all employees in the appropriate unit. Any collective bargaining agreement it negotiates must cover all such

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[5] ORS 243.650 Definitions for ORS 243.650 to 243.782. "As used in ORS 243.650 to 243.782, unless the context requires otherwise:

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

employees without regard to member/non-member status. An exclusive representative that fails to do so is subject to unfair labor practice complaint for such failure.[6]

Similarly, the public employer of the employees in an appropriate unit must bargain in good faith, and it may not treat employees differently because of whether or not they exercise their right.

B. Costs of Collective Bargaining and Contract Administration

An issue that is frequently the subject of Initiative Petitions, several dozen over the last 20 years, has been the negotiated provisions requiring represented non-members to pay a "fair share" fee based on that portion of member dues that are attributable only to collective bargaining negotiations and contract administration. Public discussion and debate, and reports of them, usually conflates or confuses "representation" with "membership;" and "dues" with "fees," often using them interchangeably; and mistaking and substituting terms such as "union shop" for "agency fee" or "fair share." Likewise, such discussions often, and mistakenly, assert that fees require support of union expenditures beyond collective bargaining and contract administration, and especially political and ideological activities and expenditures. For example, "union shop,"[7] denoting that all represented employees become and maintain membership in the labor organization, is unlawful under PECBA. See, e.g. *OSEA v. Oregon State University*, 2 PECBR 958 (1977); affirmed, 30 OR App 757 (1977).

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

Generically known as agency fee, "fair share" is a provision authorized by ORS 243.650(10).[8] Fair share agreements are not automatic or universal. They are subject to negotiations between the labor organization and public employer. Though a mandatory subject of negotiations, resultant contracts may and do conclude without any non-member fee obligation. There are contracts in force today in Oregon that do not contain any fair share agreement. Even when fair share agreements are included, PECBA provides an opportunity for represented employees to revoke authority of the labor organization to enter such an agreement.[9] In addition,

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[6] ORS 243.672(2)(a).
[7] The common term for "all union agreement."
[8] "'Fair-share agreement'" means an agreement between the public employer and the recognized or certified bargaining representative of public employees whereby employees who are not members of the employee organization are required to make an in-lieu-of-dues payment to an employee organization except as provided in ORS 243.666."
[9] ORS 243.650(10); OAR 115-030-0000

the authorization in ORS 243.666(1)[10] safeguards the rights of those with religious objection to payments of any kind to a labor organization.

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

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

C. Labor Organizations and Membership

Usually lost in the fog created by inappropriate interchange of terms is the nature of a labor organization and its membership. It is a contract.

These contracts include such common elements as purposes and objectives; governance structure; officer and board elections, and responsibilities and duties; budget and audit; levying dues; membership and member rights, privileges and responsibilities.

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

Labor organizations themselves are not government enterprises. They are private, unincorporated associations, governed by their own constitutions and/or bylaws, and any promulgated rules. Some may be independent. Some may be affiliated with state or national organizations or both.

Neither the government nor courts at any level require private, unincorporated associations to constitute themselves in any specific configuration or composition, nor mandate any particular class or classes of membership, nor members' specific rights, privileges or responsibilities. Each is left to its own requisites for addressing and adjudicating internal matters in dispute between members and their organization; or between a local or chapter and its state or national affiliate. Disputes may ultimately be introduced in a court for resolution within the confines of the organization's governing documents authorities and requirements.

While some point to the Labor Management Reporting and Disclosure Act of 1959, As Amended (LMRDA),[11] which does provide certain general rights of members such as access to the governing documents, and standards of conduct such as for election of officers. However, there is threshold test or requirement defining membership, it does not apply to labor organizations representing only Oregon public employees. And in fact, whatever the LMRDA may say about member rights, the National Labor Relations Act (NLRA),[12] provides specifically that while it is an unfair labor practice for a labor organization or its agents to "restrain or coerce employees in the exercise or the rights guaranteed them in Section 7 of the Act, *it shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.*"[13,14] (*emphasis added*)

That the relationship between a labor organization and its members is a contract is a well established view of long standing. "Both sides accept the concept that the international constitution forms a contract between the local, and its members, and the international. *Way v. Patton et al,* 1952, 195 Or 36, 241 P2d 895, and many similar cases unnecessary to cite." *Crocker v. Weil*, 227 Or. 260 (1961), 361 P.2d 1014.[15] (*underline emphasis added*)

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[11] 29 U.S.C. 411
[12] 29 U.S.C. 151
[13] Compare ORS 243.672 "(2) Subject to the limitations set forth in this subsection, it is an unfair labor practice for a public employee or for a labor organization or its designated representative to do any of the following: (a) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under ORS 243.650 to 243.782."
[14] Section 8(b)(1)(A)
[15] Even in dissent where the issue was a specific solution to the issue in the dispute, it's agreed "that 'The legal theory defining the role of the court in internal union affairs is that the union constitution is a contract between the union and its members.' Summers, The Law of Union Discipline: What the Courts Do in Fact, 70 Yale L J 175 (1960). Some form of legal compact exists as a result of the constitution of [the union] to which [tbe local][has subscribed . . . Our previous cases, in line with the universal rule have described this form of agreement as a contact. Quinn v. Marvin, 168 Or 52, 57-58, 120 P2d 227 (1941); Carpenters Union v. Backman, 160 Or 520, 528, 86 P2d 456 (1939)." *Crocker v. Weil* 227. *id*

In *Carpenters Union v. Backman*, 160 Or. 520, 528 (Or. 1939), the Oregon Supreme Court describes that: "The charter, constitution and general laws of the Brotherhood, together with the local constitution and laws, constitute a contract which all members of the union who have assented thereto are bound to obey so long as they remain members of the union and, upon ceasing to be members of the union, they forfeit all right to the property and funds of the union and have no more right to control the disposition of such property and funds than if they had never been members thereof." The principle is widely held even beyond the borders of Oregon.[16]

Laws intruding into contracts are forbidden by the Oregon Constitution's Article 1, Section 21.[17]

II. Effects of Initiative Petition 62

As written IP 62 proposes to amend sections of the PECBA by:

- constructing a required membership regimen for any person or entity to qualify and act as a labor organization and thereby as an exclusive representative for any Oregon public employees (*IP 62 Section 4(1)*);
- requiring this membership for any person in a position included in an appropriate bargaining wishing to join and engage in activities and expenditures for representation and collective bargaining (*IP 62 Section 3(2)(b)*);

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[16] See *Holt v. Santa Clara County Sheriff's Benefit Association*, 250 CalApp2d 926 ("It appears to be the law of this state that dissolution of an unincorporated association may be brought about by the action of the association itself as provided for in its articles of association, charter, or by-laws. (Grand Grove U.A.O.D. v. Garibaldi Grove, 130 Cal. 116 [62 P. 486, 80 Am.St.Rep. 80]; Supreme Lodge of the World v. Los Angeles Lodge No. 386, 177 Cal. 132 [169 P. 1040].) The propriety of such a method of dissolution stems from the well-established principle that the constitution or by-laws of an unincorporated association have the force and effect of a contract between the association and its members as to which the members are bound and are charged with full knowledge. (Bowie v. Grand Lodge L.W., 99 Cal. 392, 395 [34 P. 103]; Levy v. Magnolia Lodge, I.O.O.F., 110 Cal. 297, 309-310 [42 P. 887]; Lawson v. Hewell, 118 Cal. 613, 618-619 [50 P. 763, 49 L.R.A. 400]; Robinson v. Templar Lodge, I.O.O.F., 117 Cal. 370, 373 [49 P. 170, 59 Am.St.Rep. 193]; Power v. Sheriffs' Relief Assn., 57 Cal. App. 2d 350, 352 [134 P.2d 827]; Weber v. Marine Cooks' & Stewards' Assn., 93 Cal. App. 2d 327, 334- 335 [208 P.2d 1009]; In re Terra, 111 Cal. App. 2d 452, 459 [244 P.2d 921]; Meyer v. Bishop, 129 Cal. 204, 206-207 [61 P. 919]; American Soc. of Composers, Authors & Publishers v. Superior Court, 207 Cal. App. 2d 676, 689 [24 Cal. Rptr. 772]; Grand Grove A.O. of D. v. Duchein, 105 Cal. 219, 224 [38 P. 947]; Subsidiary High Court A.O.F. v. Pestarino, 41 Cal. App. 712, 714 [183 P. 297].)") *id.* at 929.

Under the NLRA, the U.S. Supreme Court held in *National Labor Relations Board v. Boeing Company et al*, 412, U.S. 67, 93 S. Ct. 1952, 36 L.Ed. 2nd 752, that "Issues as to the reasonableness ore unreasonable of such fines must be decided upon the basis of law of contacts, voluntary associations, or such other principles of law as may be applied in a forum competent to adjudicate the issue."

[17] "No *ex-post facto* law, or law impairing the obligation of contracts shall ever be passed, nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution; provided, that laws locating the Capitol of the State, locating County Seats, and submitting town, and corporate acts, and other local, and Special laws may take effect, or not, upon a vote of the electors interested."

- allow members to cancel membership at any time and cease payment of dues or any other money that may be required (*IP 62 Section 3(2)(c)*);
- denying the right of members of the organization to incorporate into their dues any expenditures not related to representation and collective bargaining (*IP 62 Section 3(2)(b;*);
- requiring any exclusive representative that meets these requirements to nevertheless bifurcate its income payments should members wish to contribute to other activities, using a statutorily defined process and statutory language for individual authorization to do so (*IP 62 Section 6(1)(a)*);
- limiting the kind and nature or any organizational member benefits the labor organization may wish to provide its members (*IP 62 Section 6(2)*);
- prohibiting certification of as an exclusive representative any organization that does not comport with these internal characteristics and processes (*IP 62 Section 4(1)*);
- replacing the unfair labor practice prohibitions in ORS 243.672, and the ERB's investigation and adjudication authority in ORS 243.676 with a civil action in circuit court (*IP 62 Section 7(1)*);
- removing from the Legislature its Constitutional authority to amend definitions (*IP 62 Section 7(4)*) in the PECBA, requiring that it may be done only by a vote of the public for the following terms:
  - ORS 243.650 (1) appropriate bargaining unit;
  - ORS 243.650 (4) collective bargaining;
  - ORS 243.650 (7) (a) through (g) Employment relations;
  - ORS 243.650 (8) Exclusive representative;
  - ORS 243.650 (13) Labor organization;
  - ORS 243.650 (19) Public employee; and
  - ORS 243.650 (20) Public employer.

Clearly, IP 62 includes multiple features would that fundamentally change the Public Employee Collective Bargaining Act in several ways. It also includes multiple subjects, both contrary to the requirement for initiative petitions.

If enacted, IP 62 would limit "the right of public employees to form . . . labor organizations of their choosing. . ."

- It would prevent any newly formed or existing labor organizations from becoming an exclusive representative unless and until the prescribed membership was incorporated into the organization.
- It would disqualify current exclusive representatives from continuing in that role, notwithstanding majority support of employees in the bargaining unit, unless and until the prescribed membership was incorporated into the organization.
- It would require exclusive representatives to immediately modify its dues by reducing them by that percentage that may be political or ideological expenditures; and require them to solicit by the prescribed process and with the prescribed language any such funds that members had heretofore been voluntarily paying through regular dues. These would

have consequential effects on any state or national organizations with which an exclusive representative may be affiliated, and membership and their rights and privileges are co-extensive, extending PECBA into regulation of internal matters of state or national unincorporated associations across state lines where PECBA is without authority.

- It deceptively nullifies the fair share provisions ORS 243.650(10) by first creating a membership limited to payment of collective bargaining and related activities, then allowing employees to cancel their membership and *cease payment of money of any kind*. Such bargaining unit employees would continue to receive the benefits of the collective bargaining agreement negotiated by the union.
- It would allow any public employee to bypass the unfair labor practice provisions and immediately pursue civil action for any perceived violation of the provisions of IP 62.

Underlying all of these features is a clear requirement that the contract relationship between members and their union be altered – reconstituted -- to comport with the requirements of IP 62. Failure to do so, or not done to the satisfaction of any individual in an appropriate unit would subject the members and their organization to lawsuit.

Finally, in the guise of a statutory initiative petition IP 62 would unconstitutionally limit the authority of the Legislature to amend a statute. IP 62 is not a proposed constitutional amendment, but placing a limit on legislative authority would require one.

III. The Draft Title

A. Caption

A ballot title, as provided by ORS 250.055(2)(a), must contain a caption of up to 15 words that reasonably identifies the subject matter of the state measure. The caption must be framed so as not to "confuse or mislead potential petition signers or voters." *Mabon v. Myers*, 332 Or 633 (2001). In doing so it should neither overstate, nor understate the scope of the legal changes the initiative would enact. And, "the Attorney General may have to go beyond the words of the measure in order to give the voters accurate and neutral information about a proposed measure." *Caruthers v. Myers*, 344 Or 596, 601 (2008).

The draft caption is:

> "Public employee union cannot collect dues for uses other than representation, bargaining without member authorization."

This caption misses the point entirely. It is badly flawed because it does not accurately capture any of the effects of IP 62, and mischaracterizes the plain text. The misstatement would be misleading to petition signers and voters.

With financial support, especially fair share payments at the core of IP 62, the Attorney General would be best be guided by Supreme Court approved titles for IP 9 (2014) or IP 36 (2016) because, as noted above, IP 62 deceptively nullifies the fair share provisions. Under IP 62's dictated membership definition, member dues are equivalent to what a fair share payer would be obligated. But, with the right to cancel that membership and be relieved of any payment of any kind, they still be included in an appropriate unit, receive representation from the union and enjoy all the terms and conditions of the collective bargaining agreement. That is the "free rider" addressed by both the Oregon and U.S. Supreme Courts.

Similar circumstances in IP 9 (2014) resulted in the certified title: "Allows non-union member public employees receiving required union representative to refuse to share representation costs." IP 36 (2016) received the certified title: "Non-union public employees may benefit from union bargaining without sharing representation costs; modifies collective bargaining obligations."

The effects or IP 62 are enumerated above. Numerous as they are they present a challenge in capturing them in a 15 word statement. The draft title deficiencies can be cured if written to capture the actual major effect or effects, especially the "free rider" effects.

B. Results Statements

Results statements require a simple, understandable description of the result of the measure if approved or rejected. The purpose of each is integral to clarity for petition signers and voters. The "Yes" result statement tells petition signers and voters the result of enactment of the measure. See *Novick v. Myers*, 337 Or 568, 574 (2004). The "No" result tells voters the *status quo* retained by rejection of the measure; and to avoid misleading voters about the effect of their vote, the description must reflect the subject matter of the proposal. See *Nesbitt v. Myers*, 336 Or 424, 431 (2003).

1. Result of "Yes" Vote

The draft "Yes" Result Statement reads:

> "Result of 'Yes' Vote: 'Yes' vote prohibits public employee union from collecting dues from any member to fund activities unrelated to representation or collective bargaining, unless authorized by member."

This result statement is deeply flawed. It ignores the full range of requirements IP 62 places on public employee unions. It is much more than the collection and purpose of dues. They must redefine membership in their organizations and reduce their dues rate to the same as would otherwise be the non-member fair share fee. They must bifurcate their income in order to retain status as a certified exclusive representative. That is reached by limiting the dues to the cost of collective bargaining and contract administration, precisely the prescription required by the U.S.

Supreme Court in *Hudson, supra.* and developed in *Lehnert, supra.* The breadth of IP 62 presents a challenge to encapsulate in 25 words all of its characteristics. Nevertheless, ORS 250.0035(2)(b) requires a "simple and understandable statement of not more than 25 words that describe the result if the state measure is approved." The purpose is to "notify petition signers and voters the result or results of enactment that would have the greatest importance to the people of Oregon." *Novick v. Myers*, *Id.* at 574.

The deficiencies in the Attorney General's draft "Yes" result statement can be cured if written to capture the core effects, as discussed throughout, if IP 62 were enacted

2. Result of "No" Vote

The draft "No" Result Statement reads:

"Result of 'No' Vote: 'No' vote retains existing ability of public employee unions to collect dues from members for union purposes not directly related to representation or collective bargaining."

ORS 250.0035(2)(b) requires a "simple and understandable statement" also limited to 25 words, that described the "state of affairs" that describe the *status quo* if voters reject the initiative.

The current Public Employee Collective Bargaining Act does not intrude into the internal workings of the union. The only requirement the law places on a labor organization wishing to be designated an exclusive representative is that it have among its purposes "representing employees in their employment relations with public employers."[18]

The status quo is not simply the collection of dues and its purposes. The collective bargaining act is much broader.

The current law would continue certification of unions as exclusive representatives without regard to their membership or dues structures; leave to their internal governance matters of membership status, including withdrawal, and dues purposes and expenditures; and permit fair share agreements requiring a fee from non-members covering the costs of collective bargaining and contract administration, addressing "free rider" concerns. Complaints of violations of the rights would continue to be investigated and adjudicated by the ERB, rather than civil suit as IP 62 proposed. The inadequate draft "No" statement, should be corrected to reflect at least these matters.

C. Summary Statement

A ballot title is required under ORS 250.036(2)(d) to contain a statement of up to 125 words that accurately summarizes the measure and its *major effects*. It should provide petition signers and voters with information enough to understand what happens if they approve the measure.

[18] ORS 243.650 (13)

The statement should reflect the "breadth of its impact." *Fred Meyer, Inc v. Roberts*, 308 Or 69, 175.

The draft Summary statement reads:

> "Summary: Currently the Employment Relations Board may certify, or a public employer may recognize, a union as the "exclusive representative" of all employees in an appropriate bargaining unit of public employees. A union may use member dues for some costs unrelated to bargaining or representation. Payments nonmembers are required to make may be used only for costs related to bargaining or representation. Measure provides Board cannot certify union as "exclusive representative" if it requires its members to make contributions that are spent on activities "not necessarily and reasonably incurred for the purpose of representation and collective bargaining." Measure permits union to separately collect itemized dues for activities unrelated to representation, collective bargaining only from its members who consent in writing to additional contributions. Other provisions."

This draft summary is insufficient. It does not fully capture the measure's major effects, which are numerous changes to the PECBA, and restricting the Legislature from making changes to certain terms in the collective bargaining law. The draft statement erroneously suggests the major effect is only to the purposes for financial support of the labor organization. As reviewed above, IP 62's central theme is to require labor organizations to establishing membership and limit dues for specific purposes and in specific manners. The draft summary isolates the financial interchange, when the measure clearly demands change to the internal membership and dues programs of the union.

Capturing all that's going on in IP 62 in an adequate summary poses a challenge. The reach of the measure includes ambiguities and uncertainties, which petition singers and voters should understand to effectively form their views. That notwithstanding, the insufficient draft summary should be re-written to capture current law and the full effects of the measure. Current law allows the ERB authority to certify exclusive representatives. Unions are allowed their own self-determined membership, dues, programs and activities. Fair share provisions can be negotiated. The "free rider" effect is addressed. For petition signers and voters to understand the full effects of the measure, the summary should reflect how representation will be limited to only certain organizations that conform to the measure's specific membership and dues provisions, while allowing "free riders." They should be informed of the shift requiring unions to annually solicit individual authority for additional funds for programs and activities apart from collective bargaining. And, especially, the summary should note that the Legislature cannot exercise is lawful, constitutional authority to make certain changes to the measure if enacted.

IV. IP 62 should not be certified

As noted in the comments above, I believe IP 62 is much more than statutory changes.

The Oregon Constitution, Article IV(1)(2)(d) provides: "A *proposed law* or amendment to the Constitution shall embrace *one subject only* and matters properly connected therewith." (*emphasis added*) The Oregon Supreme Court fully explored these limitations in *Armatta v. Kitzhaber,* 327 Or. 250, 959 P.2d 49 (1998).

IP 62 suggests compliance with the single subject and related matters requirement for changes to current law. But it uses a statutory initiative as disguise to intrude into constitutional matters. Its intrusion into the contract between a union and its members clearly implicates the proposal as an effort to circumvent constitutional prohibitions or to create a *defacto* constitutional exception in the case of labor organizations. Either way, the result is inescapable interference in contracts.

IP 62 also imbeds a roadblock to Legislature by prohibiting it from making any changes to a selection of stator terms in the PECBA. Limitations or other changes to constitutional authority requires a proposal by the Legislature or by initiative. Such an initiative is subject to greater support than an initiative proposing or addressing statutes. It also requires both a single subject and a separate vote. Curtailing legislative authority to amend statutes is a separate and distinct subject from the labor law changes proposed in IP 62. It is the underlying authority of the Legislature that is the issue in IP 62's Section 8(1). Certainly, this is a separate subject from the other provisions of IP 62.

Amending fundamental law requires both a single subject and separate vote. IP 62 attempts an end run around the differences between statutory initiatives and constitutional amendment initiatives. For this reason alone, IP 62 does not comply with the requirements in the Oregon Constitution for an initiative petition.

For these reasons, the Attorney General should reject IP 62 as invalid and not certify any title.

V. Conclusion

If the Attorney General continues to defend this ballot title, it seems that an elector should consider seeking attorney fees pursuant to ORS 20.105 for the petition required to obtain a determination that IP 62 invalid because it mixes statutory and constitutional provisions, and contains more than one proposed law in violation of the Oregon Constitution; or alternatively, for the petition required to obtain a valid title from the Supreme Court.

Thank you for the opportunity to submit these comments and for your careful consideration of them. I would appreciate receipt of a copy of the certified ballot title as soon as it becomes available.

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DEPARTMENT OF JUSTICE
APPELLATE DIVISION

December 1, 2015

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

Re: Proposed Initiative Petition — Public Employee Union May Require Dues/Fees Only for Limited Representation/Bargaining Activities; Authorizes Lawsuits
DOJ File #BT-62-15; Elections Division #2016-062

Dear Mr. Williams:

We received comments on the Attorney General's draft ballot title for Initiative Petition 62 (2016) (BT-62-15) from chief petitioners Maggie Neel and Mike Forest (through counsel, Nathan Rietmann), Hanna Vaandering and Trent Lutz (through counsel, Margaret Olney), Ben Unger and Heather Conroy (through counsel, Steven Berman), and Richard Schwarz. The commenters object to the parts of the draft ballot title as follows:

Ms. Neel and Mr. Forest object to all parts the draft ballot title;
Ms. Vaandering and Mr. Lutz object to all parts of the ballot title;
Ms. Conroy objects to all parts of the ballot title; and
Mr. Schwarz objects to all parts of the ballot title.

In this letter, we discuss why we made or did not make changes to each part of the ballot title in light of the submitted comments.

Procedural constitutional requirements

Commenters Hanna Vaandering and Trent Lutz (through counsel, Margaret Olney), Ben Unger and Heather Conroy (through counsel, Steven Berman), and Richard Schwarz raise the issue of whether the proposed measure unconstitutionally restricts the powers of the legislature, and therefore must be submitted as a constitutional amendment. Commenter Richard Schwarz also contends that the measure is unconstitutional because it impairs contracts. Those issues are beyond the scope of the ballot title drafting process. *See* OAR 1650-14-0028 (providing for separate review process by Secretary of State to determine whether measure complies with constitutional procedural requirements for proposed initiative measures). Accordingly, we do not address them here.

A. The caption

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

Public employee union cannot collect dues for uses other than representation, bargaining without member authorization

We address the comments and objections below.

1. Comments from Ms. Neel and Mr. Forest

Ms. Neel and Mr. Forest object that the caption is deficient in one respect. They argue that the "actual major effect" of IP 62 is "on the collection of dues that are for *political* and *ideological* activities unrelated to collective bargaining," and that the caption should identify that effect. (Rietmann Letter, 4 (emphasis in original)).

2. Comments from Ms. Vaandering and Mr. Lutz

Ms. Vaandering and Mr. Lutz contend that the draft caption is deficient in four material respects. First, Ms. Vaandering and Mr. Lutz contend that the draft caption fails to identify a "free-rider" effect of IP 62. (Olney Letter, 9-10). They argue that IP 62 gives all covered employees the right to not be a member or pay any money required to be a member at any time, but does not otherwise change current law requiring unions to represent all bargaining unit members. (Olney Letter, 10). Therefore, they argue, an actual major effect is that "employees can, at any time, 'receive services from a labor organization without having to pay for them.'" (Id.). They argue that the caption must identify the free-rider effect like other similar initiative measures. (*Id.*). They propose that the caption should read: "Allows public employees to receive union representation without paying costs; authorizes lawsuits, attorney fees." (Olney Letter, 11); *see Novick/Bosak v. Myers*, 333 Or 18, 26, 36 P3d 464 (2001) (requiring ballot title for IP 39 (2002) to identify free-rider effect); *Sizemore/Terhune v. Myers*, 342 Or 578, 588-89, 157 P3d 188 (2007) (requiring ballot title for IP 48 (2008) to identify free-rider effect); *Towers v. Rosenblum*, 354 Or 125, 131, 310 P3d 136 (2013) (requiring caption for IP 9 (2014) to identify free-rider effect).

Second, relying on *Sizemore/Terhune v. Myers*, 342 Or at 587-88, Mr. Vaandering and Mr. Lutz contend that currently, the Employment Relations Board (ERB) has exclusive jurisdiction to interpret and enforce all disputes arising out of the Public Employee Collective Bargaining Act (the PECBA). (Olney Letter, 10). They argue that the measure authorizes any bargaining unit member to sue the union to enforce the provisions of the measure, thus divesting the ERB of its exclusive jurisdiction. (*Id.*). Therefore, they argue that the caption should inform

voters that the measure creates a new private right of action in circuit court to enforce the provisions of the proposal. (*Id.*).

Third, they argue that because the measure limits permissible expenditures to negotiations and collective bargaining "concerning employment relations," the measure appears to prohibit the collection of fees for historically "chargeable" for "permissive" expenditures related to negotiations and contract enforcement, and therefore the caption's reference to "representation" is misleading and overbroad. (Olney Letter, 11).

Finally, they contend that the reference to "member" in the second clause is inaccurate, because the measure provides that a union can collect money from any covered employee for expenditures that are unrelated to representation with authorization, and that union membership is irrelevant. (Olney Letter, 11).

3. Comments from Ms. Conroy

Ms. Conroy objects to the draft caption in several respects. First, like Commenters Vaandering and Lutz, she writes that the caption fails to alert voters to a "free-rider" effect caused by the measure. (Berman Letter, 5-7). Likewise, she objects that the caption fails to inform voters that the measure creates a new private right of action that alters the jurisdiction of the ERB. (Berman Letter, 7-8). Ms. Conroy also contends that the phrase "[p]ublic employee union cannot collect dues for uses other than representation, bargaining" is inaccurate because the effect of the measure is unclear as to the definition of dues "necessarily and reasonably incurred for the purpose of representation and collective bargaining." (Berman Letter, 7).

4. Comments from Mr. Schwarz

Mr. Schwarz also objects to the draft caption in multiple respects. He argues that the caption is "badly flawed" because it does not accurately capture "any of the effects of IP 62, and mischaracterizes the plain text." (Schwarz Letter, 9). Like Commenters Vaandering, Lutz, and Conroy, he argues that the caption fails to describe a free-rider effect of IP 62. (Schwarz Letter, 9-10).

5. Our response to the comments

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

With respect to Ms. Neel's and Mr. Forest's argument that the caption should identify that IP 62 changes law by preventing the collection of dues "that are for *political* and *ideological* activities unrelated to collective bargaining," we disagree that that is the "actual major effect" of the measure that should be included in the caption. IP 62 prevents the collection of dues for "political or ideological activity *or expenditure that is not necessarily or reasonably incurred for the purpose of representation and collective bargaining with their employer on matters concerning employment relations.*" Thus, by its terms, the measure extends to bargaining or activities beyond political and ideological activities. Although political and ideological expenditures may be the ones that petitioners are motivated to address, we do not think it is

appropriate for the ballot title to focus on those narrow aspects of the broader proposed change simply because doing so would be consistent with petitioners' motives.

With respect to Ms. Vaandering's, Mr. Lutz's, Ms. Conroy's, and Mr. Schwarz's objections about the purported free-rider effect of IP 62, after consideration of relevant statutes and decisions concerning PECBA, we agree with some of their points, but ultimately conclude that, under IP 62, unions would not be legally required to do any activity that they cannot charge to all employees who benefit.

The four commenters first argue that Section 3(2)(c) creates a free-rider effect. That paragraph provides that each individual public employee within an appropriate bargaining unit has "[t]he right to cancel membership in a labor organization recognized as an exclusive representative, and discontinue paying all member dues or other money required as a condition of membership, at any time." By its terms, this provision does not modify existing law under which nonmembers can be required to make payments in lieu of dues. That is because such "fair share" payments are neither (a) "member dues" nor (b) "money required as a condition of membership." On the contrary, those payments are only required of employees who are *not* members of the union. We cannot conclude that payments required only of nonmembers constitute "money required as a condition of membership." Consequently, by its plain terms, this paragraph would not create the free-rider effect suggested by the commenters.

Those commenters also point out that the right IP 62 would confer allows each individual public employee within an appropriate bargaining unit "to refrain from financially supporting or subsidizing * * * any expenditure that is not necessarily or reasonably incurred for the purpose of representation and collective bargaining with their employer *on matters concerning employment relations*." (Emphasis added.) Commenters point out that "employment relations" is defined by ORS 243.650 and "includes, but is not limited to, matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment." They note that there are multiple exclusions from that statutory definition, including "permissive, nonmandatory subjects of bargaining," and subjects "that have an insubstantial or de minimus effect on public employee wages, hours, and other terms and conditions of employment."

Arguably, expenses incurred in connection with representation on subjects that are excluded from the definition of "employment relations" would always be "necessarily or reasonably incurred" in connection with subjects that do constitute "employment relations." By way of example, all of those subjects would be negotiated together during collective bargaining and would be substantively interconnected. An employer might make a concession on a nonmandatory subject of bargaining in order to obtain a concession from a union on a mandatory bargaining subject. But this interpretation of IP 62 would effectively require us to read the term "employment relations" out of the measure. Principles of statutory interpretation require us to give effect to the words of a measure. Consequently, it appears that IP 62 would limit mandatory dues (and nonmember payments in lieu of dues) to amounts that are based on union expenditures "necessarily or reasonably incurred" in connection with only those activities that concern "employment relations."

We agree that this is a change that the ballot title must identify and explain. But to the extent that commenters argue that this legally requires unions to allow free-riders, we do not agree. That is because existing ORS 243.666(1) imposes an identical limitation on the extent to which unions are required to act as exclusive representatives:

> A labor organization certified by the Employment Relations Board or recognized by the public employer is the exclusive representative of the employees of a public employer for the purposes of collective bargaining *with respect to employment relations*.

(Emphasis added.) IP 62 does not propose to change this limitation. Consequently, it appears that unions retain the legal authority to require employees to make payments reflecting all of the work that unions are legally required to perform for them. It is possible that, were IP 62 to pass, unions would continue to negotiate and otherwise represent employees with respect to matters that are not "employment relations," as that term is defined by statute and interpreted by the Employment Relations Board. If that were to occur, unions could find themselves doing work for which they could not charge public employees who benefit – whether those employees are members of the union or not. On the other hand, it would be legally permissible for unions to simply refuse to bargain on matters that are not "employment relations." In that case, it does not appear that the unions would be undertaking any activities that would benefit a person not paying for the work. Consequently, it appears that any free-rider effect is both speculative and ultimately within the control of the union. As a result, we have modified the ballot title to explain that mandatory dues and fees would not be permitted to cover some representational activity that unions can – but are not required to – undertake. But we have not described this as creating a free-rider effect.

With respect to Ms. Vaandering, Mr. Lutz's, and Ms. Conroy's objection that the caption should inform voters that the measure authorizes any bargaining unit member to sue the union to enforce the provisions of the measure, thus divesting the ERB of its exclusive jurisdiction, we agree that the caption should inform voters that the measure authorizes lawsuits. *Sizemore/Terhune v. Myers*, 342 Or at 587-88.

Finally, we agree that the reference to "member" in the second clause is inaccurate, because any individual public employee may give the union consent to collect money for expenditures that are unrelated to representation.

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

Public employee union may require dues/fees only for limited representation/bargaining activities; authorizes lawsuits

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

We next consider the draft "yes" and "no" vote result statements. A ballot title must include "[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is approved." ORS 250.035(2)(b). The "yes" vote result statement

should identify "the most significant and immediate" effects of the measure. *Novick/Crew v. Myers*, 337 Or 568, 574, 100 P3d 1064 (2004). The draft "yes" vote result statement provides:

> **Result of "Yes" Vote:** "Yes" vote prohibits public employee union from collecting dues from any member to fund activities unrelated to representation or collective bargaining, unless authorized by member.

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

> **Result of "No" Vote:** "No" vote retains existing ability of public employee unions to collect dues from members for union purposes not directly related to representation or collective bargaining.

We address the comments and objections below.

1. Comments from Ms. Neel and Mr. Forest

Ms. Neel and Mr. Forest reiterate their objection to the caption, above, and argue that the draft "yes" vote result statement should be revised to notify voters that IP 62 will affect the collection of dues is that are for political and ideological activities, and that the draft "no" vote result statement should clarify that public unions are currently able to collect such dues as a condition of membership. (Rietmann Letter, 5).

2. Comments from Ms. Vaandering and Mr. Lutz

Ms. Vaandering and Mr. Lutz raise multiple objections to the draft "yes" vote result statement. First, they argue that the statement fails to identify the free-rider issue. (Olney Letter, 12). Second, they claim that the words "representation" and "collective bargaining" are misleading because the scope of those terms in IP 62 is narrower than is commonly understood. (*Id.*). Third, they reiterate their objection to the word "member." (*Id.*). Finally, they argue that the "yes" vote result statement should identify certain changes enacted by the measure, including the change in membership rules and the new enforcement scheme. (*Id.*).

Ms. Vaandering and Mr. Lutz also raise multiple objections to the draft "no" vote result statement. First, they argue that it is misleading because current law authorizes agreements between a public employer and public employee union to collect dues or "fair share" payments from all covered employees and, they contend, the draft "no" statement suggests that a union has the ability to collect dues unilaterally. (Olney Letter, 13) Second, they note that IP 62 allows employees to avoid paying even "fair share" payments, and that IP 62 requires consent from both members and nonmembers for dues payments. They argue that the "no" result statement should inform voters that public employers and unions may negotiate agreements to require all employees to share in the costs of legally required union representation. (Olney Letter, 13-14).

Finally, they contend that the draft "no" result statement should reference current law allowing a union to set membership terms. (Olney Letter, 14).

3. Comments from Ms. Conroy

Ms. Conroy reiterates her objections to the caption, above, and contends that they apply to the draft "yes" and "no" vote result statements. (Berman Letter, 8). She further contends that the draft "no" vote result statement misstates current law, which may require a non-member public employee to share in representation costs, and allows public employees to choose not to pay dues unrelated to representation or collective bargaining.

4. Comments from Mr. Schwarz

Mr. Schwarz argues that the draft "yes" vote result statement is deficient because it "ignores the full range of requirements IP 62 places on public employee unions," including requiring them to "redefine membership in their organization and reduce their dues rate to the same as would otherwise be the non-member fair share fee." (Schwarz Letter, 10-11). Schwarz also contends that the draft "no" vote result statement is inadequate, and should be modified to reflect the current law, including continued certification of unions as exclusive representatives without regard to their membership or dues structures. (*Id.*).

5. Our response to the comments

After consideration of the comments concerning the draft caption, we agree that the draft "yes" and "no" vote result statements should be revised. With respect to Ms. Neel's and Mr. Forest's argument that the "Yes" result statement should reflect that IP 62 affects the collection of dues is that are for political and ideological activities, for the reasons explained above, we disagree that that is an effect that must be included in the statement. Because the "no" result statement has been modified, we need not address their argument that the "no" vote result statement should clarify that public unions are currently able to collect dues as a condition of membership. With respect to Ms. Vaandering's, Mr. Lutz's, Ms. Conroy's, and Mr. Schwarz's objection that the "yes" result statement should be modified to explain the free-rider effect of IP 62, we disagree. However, we have modified the "yes" result statement to clarify that the measure will limit dues or fees that fund activities unrelated to limited representation or bargaining activities. We believe that other modifications to the result statements resolve Ms. Vaandering's and Mr. Lutz's objections to the words "member," "representation" and "collective bargaining." We agree that the "yes" result statement should notify voters that IP 62 authorizes lawsuits. We also agree that the "no" result statement should be modified to indicate that a union's representation extends to all members of a bargaining unit. We further agree that the statement should inform voters that unions may require all employees to share in the costs of legally required union representation. We believe other modifications resolve Mr. Schwarz's objections that the "no" result statement could more accurately reflect current law.

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

Result of "Yes" Vote: "Yes" vote prohibits public employee union from requiring dues/fees for union activities unrelated to limited representation/bargaining; employee may authorize additional payments. Authorizes lawsuits.

Result of "No" Vote: "No" vote retains ability of public employee unions to require dues/fees for all union representation/bargaining activities, require member dues for other union activities.

D. The summary

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

Summary: Currently, the Employment Relations Board may certify, or a public employer may recognize, a union as the "exclusive representative" of all employees in an appropriate bargaining unit of public employees. A union may use member dues for some costs unrelated to bargaining or representation. Payments nonmembers are required to make may be used only for costs related to bargaining or representation. Measure provides that Board cannot certify union as "exclusive representative" if it requires its members to make contributions that are spent on activities "not necessarily and reasonably incurred for the purpose of representation and collective bargaining." Measure permits union to separately collect itemized dues for activities unrelated to representation, collective bargaining only from its members who consent in writing to additional contributions. Other provisions.

We address the comments and objections below.

1. Comments from Ms. Neel and Mr. Forest

Ms. Neel and Mr. Forest reiterate their objection that the major effect of IP 62 is on member dues used for political and ideological activities unrelated to collective bargaining. (Rietmann Letter, 5-6). They also object that the draft summary fails to inform voters that fair-share fees may be used for political, ideological, and other non-collective bargaining purposes unless a nonmember takes affirmative steps to prevent it, and that nonmembers do not have the right to vote on their employment contract or otherwise have the same rights as members to participate in bargaining activities. (Rietmann Letter, 6). They also object to the word "some" costs, because it "implies there is a limit to the amount of member dues a union may use for purposes unrelated to collective bargaining or representation" and quantifies the amount spent on unrelated activities as "small." (*Id.*). Finally, they object that the statement, "Board cannot certify union … as exclusive representative" is underinclusive because Section 8(4) of IP 62 also prohibits a public employer from recognizing a union that does not comply with ORS 243.622 as an exclusive representative.

2. Comments from Ms. Vaandering and Mr. Lutz

Ms. Vaandering and Mr. Lutz object to the summary in multiple ways. First, they carry forward their objections to the caption and result statements. (Olney Letter, 15). They also contend that, 1) the first sentence is too long and the reference to the Employment Relations Board is unnecessary and potentially misleading, although they do not explain why. (*Id.*). 2) The second sentence oversimplifies the dues/"fair share" structure, and the third sentence is difficult to follow. (*Id.*). 3) The summary should note that unions establish membership terms. 4) The summary should simply describe the changes made by IP 62 and note that the effect is "unclear." (*Id.*). 4) The last sentence is inaccurate because any employee may make payments above representation fees. (*Id.*). 5) They object that the summary should inform voters that IP 62 dictates membership terms and that employees can stop paying membership fees at any time, that the measure creates a new cause of action, affecting ERB jurisdiction, and that it poses an unconstitutional attempt to limit legislative authority. (*Id.*).

3. Comments from Ms. Conroy

Ms. Conroy reiterates her objections, set out above, and further objects to the summary in three respects. First, she contends that the summary should not quote the phrase "necessarily and reasonably incurred for the purpose of representation and collective bargaining" or signal that it is "inconsistently defined." (Berman Letter, 9). Second, she argues that the summary should note that IP 62's impact on a union's ability to collect dues is unclear. (*Id.*). Third, she contends that the summary should inform voters that IP 62 poses an unconstitutional attempt to limit legislative authority. (*Id.*).

4. Comments from Mr. Schwarz

Mr. Schwarz objects that the summary contains all of the flaws he addressed concerning the other parts of the ballot title, and that the summary should be modified to explain that IP 62's "central theme is to require labor organizations to establish[] membership and limit dues for specific purposes and in specific manners." (Schwarz Letter, 12).

5. Conclusion

After consideration of the comments concerning the summary, we agree that it should be modified. First, we agree that the summary should explain the current obligations of public employee unions as to members and non-members and the requirement that non-members share representation costs. Second, we disagree that the summary should inform voters that unions establish membership terms, and should include the effect on the collection of money for purposes including "political and ideological activity." because those terms are not necessary for voters to understand the measure and its major effects. The revised summary explains that unions currently "may require dues from its members to fund expenditures related to all bargaining/representation and other union activity." It also explains that under the proposed measure, unions cannot require "payments that fund activities other than union bargaining/representation concerning 'employment relations'." Although they do not explicitly talk about membership terms, these provisions of the summary make it sufficiently clear that under this proposal unions would not be allowed to condition membership on payment of more

than the amounts allowed by IP 62. Third, we disagree that the summary should inform voters that union members may cancel membership and discontinue paying member fees at any time; the summary notes that other provisions exist and other more important effects of the measure on public employers and employees take priority for the limited space allotted for the summary. Fourth, we agree that the summary should inform voters that the measure authorizes enforcement lawsuits. Fifth, we disagree that the summary should inform voters that IP 62 poses an unconstitutional attempt to limit legislative authority; such a comment is inappropriate in the ballot title. We believe that other modifications to the result statements resolve the Mr. Schwarz's objections.

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

> **Summary:** Currently, public employees in a bargaining unit may be represented by a union. Union may require dues from its members to fund expenditures related to all bargaining/representation and other union activities. Collective bargaining agreements can require represented nonmembers to pay fees, but nonmembers cannot be required to pay fees for union activities unrelated to bargaining/representation. Measure prohibits requiring any dues/fees that fund activities other than union bargaining/representation concerning "employment relations" (defined). "Employment relations" includes all subjects on which unions, employers must bargain, but not all subjects on which they are allowed to bargain. Measure permits union to separately collect itemized payments for other representation/bargaining activities, and other union activities from employee who authorizes additional amounts. Authorizes enforcement lawsuits. Other provisions.

E. Conclusion

We certify the attached ballot title.

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Enclosure

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BALLOT TITLE

Public employee union may require dues/fees only for limited representation/bargaining activities; authorizes lawsuits

Result of "Yes" Vote: "Yes" vote prohibits public employee union from requiring dues/fees for union activities unrelated to limited representation/bargaining; employee may authorize additional payments. Authorizes lawsuits.

Result of "No" Vote: "No" vote retains ability of public employee unions to require dues/fees for all union representation/bargaining activities, require member dues for other union activities.

Summary: Currently, public employees in a bargaining unit may be represented by a union. Union may require dues from its members to fund expenditures related to all bargaining/representation and other union activities. Collective bargaining agreements can require represented nonmembers to pay fees, but nonmembers cannot be required to pay fees for union activities unrelated to bargaining/representation. Measure prohibits requiring any dues/fees that fund activities other than union bargaining/representation concerning "employment relations" (defined). "Employment relations" includes all subjects on which unions, employers must bargain, but not all subjects on which they are allowed to bargain. Measure permits union to separately collect itemized payments for other representation/bargaining activities, and other union activities from employee who authorizes additional amounts. Authorizes enforcement lawsuits. Other provisions.

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INITIATIVE PETITION

TO: All Interested Parties

FROM: Lydia Plukchi, Compliance Specialist

DATE: December 1, 2015

SUBJECT: Initiative Petition **2016-062** Certified Ballot Title

The Elections Division received a certified ballot title from the Attorney General on December 1, 2015, for Initiative Petition **2016-062**, proposed for the November 8, 2016, General Election.

Caption

Public employee union may require dues/fees only for limited representation/bargaining activities; authorizes lawsuits

Chief Petitioners

Maggie Neel PO Box 2111 Lebanon, OR 97355
Mike Forest PO Box 7524 Salem, OR 97303

Appeal Period

Any registered voter, who submitted timely written comments on the draft ballot title and is dissatisfied with the certified ballot title issued by the Attorney General, may petition the Oregon Supreme Court to review the ballot title.

If a registered voter petitions the Supreme Court to review the ballot title, the voter must notify the Elections Division. If this notice is not timely filed, the petition to the Supreme Court may be dismissed.

Appeal Due	How to Submit Appeal
December 15, 2015	Refer to Oregon Rules of Appellate Procedure, Rule 11.30 or contact the Oregon Supreme Court for more information at 503.986.5555.

Notice Due	How to Submit Notice	Where to Submit Notice
1st business day after appeal filed with Supreme Court, 5 pm	Scan and Email Fax Mail	irrlistnotifier.sos@state.or.us 503.373.7414 255 Capitol St NE Ste 501, Salem OR 97310

CERTIFICATE OF FILING

I certify that, I directed the original and seven copies of the PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition #2016-62) to be electronically filed with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system pursuant to ORAP 16 on December 15, 2015.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL (Initiative Petition #2016-62) upon the following individuals on December 15, 2015 by delivering a true, full and exact copy thereof via U.S. Mail to:

Ellen F. Rosenblum
Paul Smith, Deputy Solicitor General
Department of Justice
1162 Court St. NE
Salem, OR 97310-4096
Telephone: (503) 378-4402
Facsimile: (503) 378-6306
Attorneys for Respondent

Maggie Neel
PO Box 2111
Lebanon, OR 97355

Mike Forest
PO Box 7524
Salem, OR 97303

and upon the following individual via facsimile transmission:

Jeanne P. Atkins, Secretary of State
Elections Division
255 Capitol St. NE, Ste 501
Salem, Oregon 97310-0722
Fax: 1-503-373-7414

DATED December 15, 2015.

BENNETT, HARTMAN, MORRIS & KAPLAN, LLP

s/Aruna A. Masih
Aruna A. Masih, OSB #973241
of Attorneys for Petitioners