IN THE SUPREME COURT OF THE STATE OF OREGON

HEATHER CONROY,

Petitioner,

v.

ELLEN ROSENBLUM, Attorney General, State of Oregon,

Respondent.

No.

PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL FOR INITIATIVE PETITION NUMBER 62 (2016)

Petition to Review Ballot Title for Initiative Petition No. 62 for the General Election of November 8, 2016.

Ballot title certified by the Attorney General on December 1, 2015.

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I. PETITIONER'S INTEREST IN THIS MATTER

Pursuant to ORS 250.085 and ORAP 11.30, petitioner Heather Conroy seeks review of the certified ballot title for Initiative Petition No. 62 for the General Election of November 8, 2016 (the "Initiative"). Ms. Conroy is an elector in the State of Oregon who filed timely written comments concerning the draft ballot title with the Secretary of State pursuant to ORS 250.067(1).[1]

Ms. Conroy respectfully submits that the caption, result of yes statement and summary for the certified ballot title do not comply with the requirements of ORS 250.035(2)(a), (b) and (d). Specifically, those sections of the ballot title fail to inform voters that the Initiative creates a "free-rider" effect by allowing public employees to receive the benefits of collective bargaining and union representation without sharing in the costs of collective bargaining or union representation. The summary also is flawed because it understates the scope of the unique private right of action the Initiative creates and does not inform voters that a provision of the Initiative impermissibly seeks to limit the authority of the legislature.

II. THE COURT'S PRIOR JURISPRUDENCE REGARDING INITIATIVES THAT CREATE A "FREE RIDER" EFFECT

The Public Employee Collective Bargaining Act, ORS 243.650, *et seq.* ("PECBA") allows for payments-in-lieu-of-dues (or fair-share payments) for

[1] A copy of the Initiative is attached as Exhibit 1. A copy of the draft ballot title is attached as Exhibit 2. A copy of the comments Ms. Miller filed with the Secretary of State regarding the draft ballot title is attached as Exhibit 3. A copy of the Attorney General's response to the comments received regarding the draft ballot title is attached as Exhibit 4. A copy of the certified ballot title is attached as Exhibit 5.

public employees who choose not to become union members. *See, e.g.*, *Novick/Bosak v. Myers*, 333 Or 18, 26, 36 P3d 464 (2001) (discussing fair-share payments). Without fair-share payments, "public employees who do not join a union [would] become 'free riders,' by securing bargaining and representation services without cost." *Dale v. Kulongoski*, 321 Or 108, 111-112, 894 P2d 462 (1995) (footnote omitted).

The court repeatedly has held that when an initiative would allow "employees who choose not to be represented * * * to receive services from a labor organization without having to pay for them," that is an "actual major effect" of an initiative that must be discussed in each section of the ballot title. *Towers v. Rosenblum*, 354 Or 125, 130, 310 P3d 1136 (2013). *See also Novick/Bosak*, 333 Or at 26 ("[i]n practical terms, a prohibition on such agreements enables those employees to receive union representation without cost and represents a significant change in Oregon law") (citation omitted); *Sizemore/Terhune v. Myers*, 342 Or 578, 588-589, 157 P3d 188 (2007) (same).

III. THE INITIATIVE

The Initiative amends the PECBA to allow for free-riders. The Initiative accomplishes this by revising the requirements for membership in a public employee union and then allowing "members" to cancel their membership (and stop making payments) at any time. Three provisions of the Initiative are pertinent.

First, Section 3(2)(b) of the Initiative amends ORS 243.662 to provide that every public employee within an appropriate bargaining unit has the "right

to join and participate *as a member* in all activities" of a public employee union "that are necessarily or reasonably incurred for the purpose of representation and collective bargaining with their employer on matters concerning employment relations." (Emphasis added). Those payments may not include any funds "that may be used" by the public employee union "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 on matters concerning employment relations." Initiative, § 3(2)(b).

Second, Section 5 *prohibits* any public employee union from "compel[ling] 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 union" if any portion of those payments or dues are used by the union "to pay for, or subsidize, political or ideological activities" or "are not necessarily or reasonably incurred for the purpose of representation and collective bargaining with the employee's public employer on matters concerning employment relations." Initiative, § 5(1) (emphasis added). In other words, under the Initiative, any employee in a represented bargaining unit may become a union "member." Public employee union "membership" requires only the equivalent of a payment for representation and collective bargaining services concerning employment relations. Under the Initiative, to be a union member, a union cannot require anything more than a limited fair-share payment.

Third, the Initiative then allows any "member" to cancel his or her membership *at any time*. Specifically, the amendments made to ORS 243.662 by Section 3(2)(c) of the Initiative provide each employee within an appropriate bargaining with:

> "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."

(Emphasis added).

When section 3(2)(c) is read in conjunction with section 3(2)(b) and section 5, the free-rider effect the Initiative creates is readily apparent. Under the Initiative, to become a union member, all an employee must do is pay for representation and collective bargaining services concerning employment relations. An employee can stop being a union member at any time. When an employee stops being a member, the employee may discontinue making any payments to a union whatsoever, including "money required as a condition of membership." Initiative, § 3(2)(c). Simply put, the Initiative allows a public employee in a represented bargaining unit to stop making fair-share payments for representation and collective bargaining services concerning employment relations at any time.

However, *nothing* in the Initiative amends a public employer's obligation to treat union and non-union members the same or the union's duty of fair representation to non-members. Those obligations, found in ORS

243.672(1)(c), ORS 243.672(2)(a) and well-settled law[2] are not changed by the Initiative. As a result, the Initiative creates a free-rider issue. The predominant effect of the Initiative is similar to the predominant effect of the initiatives at issue in *Towers*, *Sizemore*, *Novick* and *Dale*. A non-union public employee will be entitled to receive representation and collective bargaining services without paying for them.[3]

IV. ARGUMENTS AND AUTHORITIES

A. The Caption Does Not Comply with the Requirements of ORS 250.035(2)(a).

ORS 250.035(2)(a) provides that a ballot title must contain a "caption of not more than 15 words that reasonably identifies the subject matter of the state measure." The caption must "state or describe the proposed measure's subject matter accurately, and in terms that will not confuse or mislead potential petition signers and voters." *Lavey v. Kroger*, 350 Or 559, 563, 258 P3d 1194

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[2]*See, e.g., Sizemore*, 342 Or at 581 n 1 ("[b]ecause of the principle of exclusive representation, a union assumes a legally imposed responsibility to fairly represent all bargaining unit members, including those who do not desire union representation, in the tasks of contract negotiation, grievance adjustment, and other activities that are germane to collective bargaining").

[3]The Initiative also provides that employees in a represented bargaining unit may choose not to make payments to a public employee labor union that support the union's political and ideological activities. Initiative, §§ 2, 3(2)(a), 5(1). That is already a long-standing option available to public employees. *See, e.g., Abood v. Detroit Board of Education*, 431 US 209, 97 S Ct 1782 (1977) (discussing non-union member's ability to refuse to make payments to union for political or ideological causes). In that regard, the Initiative does not alter existing law, and accordingly, the Initiative's provisions allowing public employees to choose whether to make "political or ideological" payments need not be addressed in the ballot title. *See, e.g., Lavey v. Kroger*, 350 Or 559, 563, 258 P3d 1194 (2011) (ballot title must identify "the *changes* that the proposed measure would enact in the context of existing law") (emphasis added; citations omitted; internal quotation marks omitted).

(2011) (citations omitted; internal quotation marks omitted). The "subject matter" of an initiative is its "actual major effect." *Lavey*, 350 Or at 563 (citation omitted; internal quotation marks omitted). The "actual major effect" is the change or changes "the proposed measure would enact in the context of existing law." *Rasmussen v. Kroger*, 350 Or 281, 285, 253 P3d 1031 (2011). A caption that is underinclusive, because it does not notify readers of all the major effects of an initiative, is statutorily noncompliant. *Towers v. Myers*, 341 Or 357, 362, 142 P3d 1040 (2006).

The certified caption provides:

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

The caption is underinclusive, and fails to describe the Initiative's major effect, because it does not mention the free-rider effect created by the Initiative. As has been made clear by the court time and again in the case law discussed above, a free-rider effect created by an Initiative must be addressed in the caption. The caption is deficient for that reason, and must be revised.

B. The Result of Yes Statement Does Not Comply with the Requirements of ORS 250.035(2)(b).

ORS 250.035(2)(b) requires that the 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 yes statement "should describe the most significant and immediate effects of the ballot initiative for the general public." *McCann v. Rosenblum*, 354 Or 701, 707, 320 P3d 548 (2014) (internal quotation marks omitted; citation omitted).

The certified result of yes statement provides:

> "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.

The yes statement is flawed for the same reason as the caption. It does not address the free-rider effect created by the Initiative.

C. The Summary Does Not Comply With the Requirements of ORS 250.035(2)(d).

ORS 250.035(2)(d) requires that the ballot title contain a "concise and impartial statement of not more than 125 words summarizing the state measure and its major effect." Petitioner Conroy respectfully submits that the summary is flawed, for three reasons. First, the summary does not address the free-rider effect created by the Initiative. For the reasons set forth above, the summary must be modified to address that issue.

The second flaw with the summary is that it does not adequately discuss the unique remedy provision and cause of action created by the Initiative. Section 7 provides "[e]very public employee within an appropriate bargaining unit represented by" a public employee union with "the right to commence a civil action in any circuit court of this state where the [public employee union] has members to enforce the rights recognized by this 2016 Act." That standing provision is quite uncommon, in that harm to the public employee is, apparently, not required. The Initiative is silent as to who would be the defendant in any such civil action. The remedies in any such action include injunctive and equitable relief, actual damages and mandatory prevailing

plaintiff attorney fees and costs. *Id.* Section 7 would divest the Employment Relations Board of its exclusive jurisdiction to determine what constitutes an unfair labor practice under the PECBA. ORS 243.676.

The court has held that when an initiative provides or creates a cause of action, voters must be so notified. *Greenberg v. Myers*, 340 Or 65, 70-72, 127 P3d 1192 (2006). *See also Wilkerson v. Myers*, 329 Or 540, 546, 992 P2d 456 (1999) (holding that provision in initiative allowing for litigation is "a significant change in the law" that must be included in the results statements). Recently, the court again clarified that "to accurately describe an actual effect of the proposed measure at issue, a caption appropriately may or even perhaps should refer to a new authorization of legal action." *Blosser/Romain v. Rosenblum*, 358 Or 312, 317, ___ P3d ___ (2015). *See also Kendoll v. Rosenblum*, 358 Or 282, 287, ___ P3d ___ (2015) (discussing Attorney General's appropriate use of the phrase "authorizes lawsuits" in caption). And, when possible within the 125-word limit, "the summary also should refer to the potential for attorney fees." *Blosser/Romain*, 358 Or at 319 n 3. *See also Kendoll*, 258 Or at 290 n 4 (court stating that ballot title summary "appropriately notes" that the remedy provision in the initiative at issue allows for "prevailing party fees").

The summary only cursorily describes the Initiative's unique remedy provision, by using the phrase "[a]uthorizes enforcement lawsuits." That is insufficient. In the very least, the summary should state that the Initiative

allows for litigation, even in the absence of harm, and authorizes one-sided prevailing plaintiff attorneys' fees.

The third flaw with the summary is that it fails to mention the Initiative's curious – and unenforceable – provision that seeks to limit the authority of the legislature to amend certain provisions of the Initiative. The authority of the legislature to adopt laws and the electors' authority to enact laws via the initiative are identical. As the Supreme Court explained in *Hazell v. Brown*, 352 Or 455, 465, 287 P2d 1079 (2012):

> "We have recognized that the legislative power is a unitary authority that rests with two lawmaking bodies, the legislature and the people. The exercise of that power is always coequal and co-ordinate, regardless of which of the two entities wields it."

(Citations omitted; internal quotation marks omitted).

Section 8(1) of the Initiative seeks to shift that balance of power. Specifically, Section 8(1) provides that certain terms in the Initiative "shall have the meanings provided in ORS 243.650 (2015)." Section 8(1) further provides that those definitions cannot be amended unless submitted to a statewide initiative or referral. In other words, under Section 8(1), the legislature cannot amend certain statutory terms, only the voters can. That is inconsistent with the current constitutional structure.

When "the relationship between the proposed measure and existing * * * law is straightforward and settled," the Attorney General's "obligation to describe the proposed measure accurately" includes informing voters of the "measure's more limited effect." *Caruthers v. Myers*, 344 Or 596, 602, 604, 189 P3d 1 (2008). The ballot title must also inform voters when the legal effect

of an initiative is "unclear." *Caruthers*, 344 Or at 603-604. *See also Wolf v. Myers*, 343 Or 494, 504, 173 P3d 812 (2007) ("the Attorney General may state that the 'result' and the 'effect' of the measure * * * is unclear, if that statement satisfies statutory requirements").

Ms. Conroy submits that the issue presented here is similar to the issue presented in *Caruthers*. Section 8 seeks to defy well-settled Oregon constitutional law principles. In the very least, the legal import of the Initiative's effort to usurp the authority of the legislature is "unclear." Voters must be informed that the Initiative will not, or may well not, accomplish what the Initiative purports to accomplish.

V. CONCLUSION

Ms. Conroy respectfully requests that the court certify to the Secretary of State a ballot title that complies with the requirements of ORS 250.035(2) in lieu of the ballot title certified by the Attorney General or, alternatively, refer the ballot title to the Attorney General for modification.

DATED this 15th day of December, 2015.

Respectfully submitted,

STOLL STOLL BERNE LOKTING & SHLACHTER, PC

By: /s/ Steven C. Berman
Steven C. Berman, OSB No. 951769

Attorneys for Petitioner Heather Conroy

CERTIFICATE OF FILING AND PROOF OF SERVICE

I hereby certify that on December 15, 2015, I electronically filed the original PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL FOR INITIATIVE PETITION NUMBER 62 (2016), and accompanying exhibits, with the Appellate Court Administrator.

I further certify that on December 15, 2015, I served the foregoing PETITION TO REVIEW BALLOT TITLE CERTIFIED BY THE ATTORNEY GENERAL FOR INITIATIVE PETITION NUMBER 62 (2016), and accompanying exhibits, by regular first class mail on:

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DATED this 15th day of December, 2015.

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