ELLEN F. ROSENBLUM
Attorney General

FREDERICK M. BOSS
Deputy Attorney General

DEPARTMENT OF JUSTICE
APPELLATE DIVISION

December 4, 2015

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

Re: *Cynthia Kendoll v. Ellen F. Rosenblum*
SC S063675

Dear Chief Justice Balmer:

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

Sincerely,

/s/ Carson L. Whitehead

Carson L. Whitehead
Assistant Attorney General
carson.l.whitehead@doj.state.or.us

CW7:aft/6983280

Enclosures

cc: Jill Odell Gibson
Sal Esquivel/without encl.
James H. Ludwick/without encl.
Mike Nearman/without encl.

IN THE SUPREME COURT OF THE STATE OF OREGON

CYNTHIA KENDOLL, Petitioner, v. ELLEN F. ROSENBLUM, Attorney General, State of Oregon, Respondent.	Supreme Court No. S063675 RESPONDENT'S ANSWERING MEMORANDUM TO PETITION TO REVIEW BALLOT TITLE RE: INITIATIVE PETITION NO. 52

I. INTRODUCTION

Initiative Petition 52 (2016) "imputes" a new "employment license" to all Oregon employers and requires that license—and any other "license" as defined in the measure—to be in effect for an employer to employ any person. IP 52, § 3(a). To maintain the "employment license" and other state and local "licenses," employers must use the federal E-Verify program to verify any new employee's authorization to work. IP 52, § 3(c). If an employer fails to comply, the Secretary of State places the employer on probation; additional violations result in suspension of the employment license and other licenses. IP 52, § 4.

Petitioner Cynthia Kendoll commented on the draft ballot title and now argues that the certified ballot title is flawed in two key respects: (1) the ballot title fails to identify the subject matter of the measure because it does not "inform voters that the measure pertains to the legal presence of employees in the United States;" and (2) the ballot title is inaccurate because it incorrectly

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implies that "current Oregon law requires employers to confirm employees' legal presence." (Pet Br at 3-4). As discussed below, petitioner is incorrect in both respects.

II. ARGUMENT

A. The caption accurately describes the major effects of the measure.

A ballot title must contain a caption "that reasonably identifies the subject matter" of the proposed 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 Attorney General's caption for Initiative Petition 52 identifies the subject matter of the measure as follows:

> "Imputes" "employment license" to employers; conditions "license" on using specified federal program for employment authorization

That caption substantially complies with ORS 250.035(2)(a).

In her petition, Ms. Kendoll argues that the "actual major effect" of Initiative Petition 52 is to require employers to verify an employee's "legal

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presence" for employment purposes and that the caption fails to identify that effect. Petitioner asserts that the caption "gives voters no indication that IP 52 is about preventing the employment of persons who are not legally present in the United States, although the measure is clearly about this." (Pet at 5). Petitioner's assertion about the effect of the measure is not accurate.

The phrase "legal presence" does not appear in Initiative Petition 52. The measure does not make it illegal for Oregon businesses to employ unauthorized aliens or create the requirement that an employer must verify an employee's authorization to work. Rather, federal law already prohibits the employment of unauthorized aliens and requires employers to verify new employees' authorization for employment. *See* 8 USC § 1324a(a), (b) (describing employment verification system). To meet that requirement, employers must review documents establishing an employee's eligibility for employment and attest to conducting that review. *Id.* § 1324a(b)(1) and (2); *Chamber of Commerce of U.S. v. Whiting*, 563 US 582, 131 S Ct 1968, 1974, 179 L Ed 2d 1031 (2011). Employers can use Form I-9 to demonstrate compliance. *Id*. Additionally, employers have the option of using the E-Verify program to review an employee's authorization. 8 USC § 1324a(b); *Whiting*, 131 S Ct at 1975.

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Considering that context, Initiative Petition 52 has two major effects, both of which are described in the caption: (1) it "imputes" an "employment license" to all employers and (2) conditions that license—and other "licenses," including any business permit, certificate, or charter issued by the state or local governments—on the employer using E-Verify. Preventing the employment of persons who are not legally present in the United States is a secondary effect of the measure that follows, primarily, from existing federal law.

Petitioner also argues that the caption does not give sufficient context to phrase "employment authorization" and that voters could mistakenly believe that "employment authorization" concerns other employment requirements such as professional licenses or minimum working age. Petitioner's concerns are unfounded. First, "employment authorization" or a similar phrase, "work authorization," is used throughout Initiative Petition 52 and accurately reflects the text. *See* IP 52, §§ 2(c), 2(d), 2(h), 3(b), 3(c), 3(d). Second, "employment authorization" is a common phrase that voters will understand as referring to the authorization for employment required by federal law. Federal law has required that employers confirm an employee's authorization to work since the passage of the Immigration Reform and Control Act in 1986. *See Whiting*, 113 S Ct at 1974-75 (describing history of federal requirement for employment authorization). Any person who has obtained new employment since 1986 has

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been required to provide documentation to show employment authorization and has likely filled out an I-9 Employment Eligibility Verification form. In light of that common experience, it is unlikely that voters would need further explanation of the phrase "employment authorization." *See Peterson v. Meyers*, 334 Or 48, 52, 44 P3d 586 (2002) (noting that voters will readily understand the common phrase "term limits").

Petitioner also argues that the caption's use of "specified federal program" is confusing and uninformative, and that the caption should use the term "E-Verify." Again, petitioner is incorrect. Initiative Petition 52 uses the term "employment authorization program," which is defined as E-Verify or "any successor program." IP 52, § 2(d). Elsewhere, the measure uses the term "federal government employment authorization program." IP 52 §§ 2(h), 3(b). "Specified federal program" accurately reflects the text of the proposed measure, which includes E-Verify *or* any successor program.

Moreover, the term "E-Verify" is also problematic because it is a politicized term, intended to promote the voluntary use of the program. *See Whiting*, 131 S Ct at 1975 (noting name change from "Basic Pilot Program" to "E-Verify" in 2007); United States Citizenship and Immigration Services, "E-Verify," http://www.uscis.gov/e-verify (stating that "E-Verify is fast, free and easy to use – and it's the best way employers can ensure a legal workforce.")

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(last visited November 29, 2015). Because "E-Verify" is freighted with political meaning, the ballot title uses the neutral phrase "specified federal program." *See Earls v. Meyers*, 330 Or 171, 176, 999 P2d 1134 (2000) (ballot title should not use "politically inflated terms or phrases" designed to advance passage even if used in the text of the measure).

B. The result statements accurately describe the results of approval or rejection of the measure.

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). Petitioner makes no independent arguments regarding the "yes" result statement but asserts that it has the same flaws as the caption. As discussed above, petitioner is incorrect. The "yes" result statement accurately identifies the most significant and immediate effects of measure and therefore substantially complies with ORS 250.035.

A ballot title must also 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)(c). The "no" vote result statement "should

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'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 "no" result statement provides:

> "No" vote maintains current law requiring employer to confirm employee's employment authorization using documentation; current law does not require "employment license" or using specified program.

That result statement accurately describes the current status of state and federal law.

As noted, existing federal law requires employers to confirm an employee's authorization using documentation and gives employers the option of using the E-Verify program. 8 USC § 1324a(b), (d). Neither state nor federal law currently require an employer to possess an "employment license" or require an employer to use the E-Verify program. Accordingly, the "no" result statement substantially complies with ORS 250.035(2)(c).

Nevertheless, petitioner contends that the "no" result is confusing because it does not distinguish between state and federal law. Petitioner asserts that "no" result impermissibly suggests that current Oregon law requires employers to verify an employee's authorization and implies that a "yes" vote

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"would eliminate the federal requirement to verify an employee's legal presence." (Pet Br 8-9). In petitioner's view, the "no" result should focus on Oregon law exclusively and inform voters that current state law does not require employers to verify employment authorization using E-Verify. (Pet Br 9).

Petitioner's objections to the "no" result statement are misplaced. There is no provision in ORS 250.035 or this court's case law that requires the "no" result statement to separately identify state and federal law. The legal requirement is that the statement be accurate. *McCann*, 354 Or at 707. As noted, the "no" result is accurate because it describes the existing state and federal law on the subject matter of the proposed measure. Although labeling current law as "federal" or "state" could somewhat increase the accuracy, the "no" statement is unlikely to confuse or mislead voters about the state of current law. Moreover, including those words would have required excluding others. Because the "no" result statement accurately describes current law, the statement substantially complies with ORS 250.035(2)(c).

C. The summary accurately summarizes the measure and its major effects.

A ballot title must include "[a] concise and impartial statement of not more than 125 words summarizing the state measure and its major effect."

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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. Petitioner argues that the summary has the same flaws as the caption and "no" result statement. As discussed above, petitioner is incorrect. The summary accurately summarizes the measure and it major effects and therefore substantially complies with ORS 250.035.

Petitioner raises three additional arguments against the summary. First, she argues that the phrase "internet-based federal program" is unclear as a description of the E-Verify program. That phrase, however, is substantially similar to how the United States Department of Homeland Security itself describes E-Verify. *See* U.S. Citizenship and Immigration Services, "What is E-Verify?" available at http://www.uscis.gov/e-verify/what-e-verify (describing E-Verify as "an Internet-based system") (last visited November 30, 2015). The phrase is clear and accurate.

Second, petitioner argues that the summary improperly states that "'Nonconfirmation' can result from employee ineligibility/ incorrect information." Section 3(c) of the measure notes that a "Tentative Nonconfirmation" is one possible result of submitting a new employee's name and information to the E-Verify program. The explanation for why a "nonconfirmation" could result provides important context and also explains

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why an employee would need to "contest" the result. *See Whiting*, 131 S Ct at 1997 (Brennan, J., dissenting) (noting reasons for nonconfirmation).

Third, petitioner argues that the summary must describe the exception for casual domestic employment. The exception for casual domestic employment is not necessary for voters to understand the measure and its major effects. The summary notes that exceptions exist; the other more important effects of the measure on Oregon employers and state agencies take priority for the limited space allotted for the summary.

CONCLUSION

Because it substantially complies with ORS 250.035, this court should certify the Attorney General's ballot title for Initiative Petition 52.

Respectfully submitted,

ELLEN F. ROSENBLUM #753239
Attorney General
PAUL L. SMITH #001870
Deputy Solicitor General

/s/ Carson L. Whitehead
CARSON L. WHITEHEAD #105404
Assistant Attorney General
carson.l.whitehead@doj.state.or.us

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

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Thomas Alicia F

From: PLUKCHI Lydia <lydia.plukchi@state.or.us>
Sent: Monday, November 16, 2015 10:11 AM
To: THOMAS Alicia F
Subject: Initiative Petition #52 Appealed
Attachments: 052dbt.pdf; 052cmts.pdf; 052cbt.pdf

OFFICE OF THE SECRETARY OF STATE

JEANNE P. ATKINS
SECRETARY OF STATE

ROBERT TAYLOR
DEPUTY SECRETARY OF STATE

ELECTIONS DIVISION

JIM WILLIAMS
DIRECTOR

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

(503) 986-1518

November 16, 2015

The Hon. Ellen Rosenblum, Attorney General
Paul Smith, Deputy Solicitor General
Dept. of Justice, Appellate Division
400 Justice Building
Salem, OR 97310

Via Email

Dear Mr. Smith:

In accordance with ORS 250.067(4) please file the attached comments with the court as part of the record in the ballot title challenge filed by Jill Gibson on Initiative Petition **2016-052**. Also attached are the draft and certified ballot titles with their respective transmittal letters.

Sincerely,

Lydia Plukchi
Compliance Specialist

OFFICE OF THE SECRETARY OF STATE

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INITIATIVE PETITION

TO: All Interested Parties

FROM: Lydia Plukchi, Compliance Specialist

DATE: September 30, 2015

SUBJECT: Initiative Petition **2016-052** Draft Ballot Title

The Elections Division received a draft ballot title from the Attorney General on September 30, 2015, for Initiative Petition **2016-052**, proposed for the November 8, 2016, General Election.

Caption

Requires "employment license" for employers; conditions license on using specified federal program for employment authorization

Chief Petitioners

Sal Esquivel	11 Corning Ct Medford, OR 97504
James Ludwick	7500 SW Lebold Rd McMinnville, OR 97128
Mike Nearman	2570 Greenwood Rd S Independence, OR 97351

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
October 14, 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

September 30, 2015

RECEIVED
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SECRETARY OF STATE

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

Re: Proposed Initiative Petition — Requires "Employment License" for Employers; Conditions License on Using Specified Federal Program for Employment Authorization
DOJ File #BT-52-15; Elections Division #2016-052

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 requiring an "employment license" for employers, and conditions said license on using a specified federal program for employment authorization.

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/6822576

Enclosure

Sal Esquivel
11 Corning Ct.
Medford, OR 97504

James Ludwick
7500 SW Lebold Rd.
McMinnville, OR 97128

Mike Nearman
2570 Greenwood Rd. S.
Independence, OR 97351

DRAFT BALLOT TITLE

Requires "employment license" for employers; conditions license on using specified federal program for employment authorization

Result of "Yes" Vote: "Yes" vote "imputes" (undefined) "employment license" to employers; license required to employ any person. License requires verifying new employee's employment authorization using specified federal program.

Result of "No" Vote: "No" vote maintains current law requiring employer to confirm employee's employment authorization without using specified federal program.

Summary: Existing law requires employers to confirm employee's employment authorization; can use Form I-9. Measure "imputes" "employment license" to all employers. Requires employers with five or more employees to verify new employee's employment authorization using internet-based federal program/successor program. Prohibits employing any person if employer's "employment license" or other "license" (defined) suspended/revoked. Penalties for noncompliance include suspension of all "licenses" by Secretary of State, prohibiting employment of any person. Required federal program indicates employment is "authorized" or issues "nonconfirmation." "Nonconfirmation" can result from employee ineligibility or incorrect information. Employee may appeal "nonconfirmation;" adverse employment action prohibited during appeal. Oregon Employment Department shall provide technical advice, access to federal program. Secretary of State shall report penalties to federal immigration authorities. Exceptions. Other terms.

GIBSON
LAW FIRM

October 14, 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 Capitol Street NE, Ste. 501
Salem, OR 97310-0722

Re: Public Comment on Initiative Petition 52 (2016)

Dear Secretary Atkins,

I represent Cynthia Kendoll, an elector in the State of Oregon who wishes to comment on the draft ballot title for IP 52 (2016). Thank you for the opportunity to provide comments.

I. INTRODUCTION

IP 52 would require employers to verify that their new employees are legally authorized to work in the United States. Specifically, private employers who employ five or more employees would be required to verify that their new employees are authorized to work in the United States by using E-Verify. The E-verify program is a web-based system administered by the Social Security Administration ("SSA") and the U.S. Department of Homeland Security ("Homeland Security"). It confirms employment eligibility by comparing information provided by an employee on their Form I-9 to data available to SSA and Homeland Security, such as passport information, visas, immigration records, and social security numbers. If the information submitted to E-verify matches, the employer will almost immediately receive a message of "Employment Authorized." If the information does not match, the employer receives a "Tentative Nonconfirmation" message.[1]

Pursuant to IP 52, employees who receive "Tentative Nonconfirmation" may contest that result, during which time employers are prohibited from terminating or taking any adverse employment action against the employee until the matter is resolved. IP 52 would be enforced through a licensing system, in which all private employers must possess and will be imputed an employment license. To maintain its employment license, which is required to employ an employee, employers must comply with the measure and use E-verify to confirm employment

[1] In Fiscal Year 2014, 98.8% of all employees whose information was submitted to E-verify were confirmed as "Employment Authorized" and only 1.2% received a "Tentative Nonconfirmation." http://www.uscis.gov/e-verify/about-program/performance. Of the 1.2% who were not confirmed as employment eligible, .19% were confirmed as work authorized after contesting and resolving the mismatch and 1.04% were not found authorized for work. *Id.*

authorization of new employees within three business days of the hiring date. Employers who fail to do so will be put on probation for one year, during which time the employer must submit quarterly reports demonstrating compliance. For a subsequent violation, the employer's license will be suspended for at least 30 days but not more than one year.

II. DRAFT BALLOT TITLE

The Attorney General has proposed the following ballot title for IP 52:

Requires "employment license" for employers; conditions license on using specified federal program for employment authorization

Result of "Yes" Vote: "Yes" vote "imputes" (undefined) "employment license" to employers; license required to employ any person. License requires verifying new employee's employment authorization using specified federal program.

Result of "No" Vote: "No" vote maintains current law requiring employer to confirm employee's employment authorization without using specified federal program.

Summary: Existing law requires employers to confirm employee's employment authorization; can use Form I-9. Measure "imputes" "employment license" to all employers. Requires employers with five or more employees to verify new employee's employment authorization using internet-based federal program/successor program. Prohibits employing any person if employer's "employment license" or other "license" (defined) suspended/revoked. Penalties for noncompliance include suspension of all "licenses" by Secretary of State, prohibiting employment of any person. Required federal program indicates employment is "authorized"" or issues "nonconfirmation." "Nonconfirmation" can result from employee ineligibility or incorrect information. Employee may appeal "nonconfirmation;" adverse employment action prohibited during appeal. Oregon Employment Department shall provide technical advice, access to federal program. Secretary of State shall report penalties to federal immigration authorities. Exceptions. Other terms.

III. COMMENTS ON THE DRAFT BALLOT TITLE

A. The Caption

ORS 250.035(2)(a) requires a ballot title to contain "[a] caption of not more than 15 words that reasonably identifies the subject matter of the state measure." The "subject matter" of a measure is "the 'actual major effect' of a measure or, if the measure has more than one major effect, all such effects (to the limit of the available words)." *Lavey v. Kroger*, 350 Or 559, 563, 258 P.3d 1194 (2011) (citation omitted). When the Attorney General chooses to describe a measure by listing the changes that the proposed measure would enact, some changes may be of "sufficient significance" that they must be included in the description. *See*

Brady/Berman v. Kroger, 347 Or 518, 523, 225 P.3d 36 (2009) (so concluding); *see also Greenberg v. Myers*, 340 Or 65, 69, 127 P.3d 1192 (2006) ("What the Attorney General cannot do is select and identify in a caption only one out of multiple subjects and thus understate the scope of the proposed measure's subject matter."). Similarly, a caption that is underinclusive, because it fails to inform voters of all the major effects of an initiative, is statutorily noncompliant. *Towers v. Myers*, 341 Or 357, 362, 142 P3d 1040 (2006).

IP 52's draft caption is underinclusive because it does not identify the measure's primary subject matter: requiring employers to verify a new employee's legal authorization to be employed in the United States. The measure specifically defines "employment" as "any service or labor performed by an employee for an employer within the United States," Section 2(c), and the actual major effect is requiring employers to verify that an employee's citizenship and immigration status authorizes "employment." Instead of identifying the primary subject matter, the draft caption inappropriately focuses on the "employment license." Although a licensing system is the enforcement mechanism used by the measure to ensure compliance, it is not the primary subject matter and does not alert voters that this measure is about eligibility to work based on legal presence in the United States. Therefore, reference to the license should be included in the "yes" vote result statement instead of the caption.

The draft caption states that the measure requires "using specified federal program for employment authorization;" however, this does not inform voters that an employee's citizenship and immigration status is the focus of the employment authorization. Indeed, "employment authorization" could refer to other requirements of employment, such as professional licensure or the legally required minimum age. Our suggested caption (below) includes the phrase "authorization to work in the United States" to clarify for voters that the subject of IP 52 is authorization to work based on citizenship or immigration status. Also, the draft caption's reference to "specified federal program" is confusing because the federal government has a plethora of programs. In order to impart meaningful information to the voter, we suggest using the word "E-verify" because it is clear, accurate, and many voters are familiar with E-verify as a way to check citizenship and immigration status.

To address these insufficiencies, we propose the following caption:

Requires employers to verify new employees' authorization to work in United States using E-Verify program

B. The Result of "Yes" Vote Statement

ORS 250.035(2)(b) requires that a ballot title contain a "simple and understandable statement," of not more than 25 words, explaining what will happen if the measure is approved. As the Oregon Supreme Court has observed, the "yes" vote result statement should describe "the most significant and immediate" effects of the ballot initiative for "the general public." *Novick/Crew v. Myers*, 337 Or 568, 574, 100 P.3d 1064 (2004).

For convenience, we will restate the "yes" vote result statement proposed by the Attorney General:

Result of "Yes" Vote: "Yes" vote "imputes" (undefined) "employment license" to employers; license required to employ any person. License requires verifying new employee's employment authorization using specified federal program.

This "yes" vote result statement suffers from the same deficiencies as the caption because it fails to alert voters that the measure's subject matter is verification of an employee's authorization to work in the United States. Additionally, the use of quotation marks around "imputes" followed by "(undefined)" is confusing, unnecessary, and inaccurately implies that the word is used in a manner that is unclear or different than its normal definition. *See, e.g., Hunnicutt v. Myers*, 342 Or. 491, 495-96, 155 P.3d 870 (2007) (rejecting argument that term from measure used in ballot title should be identified as "undefined" because meaning of word, "in context, is sufficiently clear that no signal . . . is necessary to achieve substantial compliance with statutory standards"). "Impute" means "to attribute accusingly" or "to credit or ascribe to a person or a cause." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993). IP 52 requires employers to have an employment license, but rather than requiring a state agency to actually issue licenses to every employer upon passage of the measure, the measures states, "All employers in Oregon shall be imputed an Oregon employment license, which permits a private employer to employ a person in this state." Section 3(a). As used in the measure, it is clear that "imputes" means that employment licenses will be attributed to employers. Because IP 52 uses the word "impute" in its ordinary meaning, it should not be put inside quotation marks and labeled "undefined."

To address these insufficiencies, we propose:

Result of "Yes" Vote: "Yes" vote requires employers to use federal E-Verify program to verify new employees' authorization to work in United States in order to maintain employment license.

C. The Result of "No' Vote Statement

ORS 250.035(2)(c) requires that a ballot title contain a "simple and understandable statement," of not more than 25 words, explaining what will happen if voters reject the measure. This means that the statement must explain to voters "the state of affairs" that will exist if the initiative is rejected, i.e. the status quo. Also, a "no" vote result statement should "address[ ] the substance of current law *on the subject matter of the proposed measure*" and "summarize [ ] the current law accurately." *Novick/Crew* at 577, 100 P.3d 1064 (emphasis in original).

In addition to containing the insufficiencies noted above, the "no" result statement is inaccurate and misleading because it states that current law "requires" employers to confirm

employees' employment authorization. The results statements must address *state* law, not federal law, and there is no current state law requiring verification of employment authorization. The federal government makes it unlawful to hire unauthorized persons, 8 U.S.C. § 1324a, but doing so does not violate any state law. The draft "no" result statement will mislead voters to mistakenly believe that Oregon law currently requires employers to verify an employee's citizenship or immigration status. Additionally, contrary to the "no" result statement, Oregon law does not require employers to confirm employment authorization "without using specified federal program." This language is confusing and implies that state law prohibits using E-verify or another federal program when confirming employment authorization, which is not the case.

To accurately describe the status quo, please consider the following:

Result of "No" Vote: "No" vote maintains current state law not requiring employers to verify new employees' legal authorization to be employed in the United States.

D. The Summary

ORS 250.035(2)(d) requires that a ballot title contain a "concise and impartial statement of not more than 125 words summarizing the state measure and its major effects." The purpose of a ballot title's summary is to give voters enough information to understand what will happen if the initiative is adopted. *See Whitsett v. Kroger*, 348 Or 243, 252, 230 P.3d 545 (2010).

The summary adequately describes several elements of IP 52; however, it contains a few deficiencies that need to be corrected. For convenience, I have underlined the language we find noncompliant in the Attorney General's draft summary:

> **Summary:** Existing law requires employers to confirm employee's employment authorization; can use Form I-9. Measure "imputes" "employment license" to all employers. Requires employers with five or more employees to verify new employee's employment authorization using internet-based federal program/successor program. Prohibits employing any person if employer's "employment license" or other "license" (defined) suspended/revoked. Penalties for noncompliance include suspension of all "licenses" by Secretary of State, prohibiting employment of any person. Required federal program indicates employment is "authorized"" or issues "nonconfirmation." "Nonconfirmation" can result from employee ineligibility or incorrect information. Employee may appeal "nonconfirmation;" adverse employment action prohibited during appeal. Oregon Employment Department shall provide technical advice, access to federal program. Secretary of State shall report penalties to federal immigration authorities. Exceptions. Other terms.

As an initial matter, the summary does not identify for voters that the actual major effect of the measure is to require employers to verify new employees' legal authorization to work in

the United States based on citizenship and immigration status. Additionally, as discussed previously, the draft summary inaccurately implies that *state* law requires verification of employment authorization.

Putting quotation marks around "imputed" is confusing and unnecessary because the word should be given its plain English meaning. Implying that the word means something other than its ordinary meaning is pejorative and reflects negatively on the measure. Because ORS 250.035(2)(d) requires that the summary be impartial, the quotation marks should be removed. Similarly, the word "license" should not be put in quotation marks or followed by the word "(defined)" because it, also, is used in its ordinary meaning. Although the measure includes a definition, it does not differ from the common definition.

We believe references to "federal program/successor program" and "required federal program" should be replaced with "federal E-verify program" because it makes clear to voters which of the many federal programs the measures requires to be used. "Required federal program" does not give voters sufficient information and does not alert voters to the underlying issue: employment authorization based on citizenship and immigration status. Many voters are familiar with E-verify and know it verifies a person's authority to work in the United States based on legal presence.

The draft summary includes several inaccuracies. First, it states that penalties for noncompliance include suspension of "all 'licenses'"; however IP 52 states that an "employer's license" may be suspended. The measure clearly refers to suspension of the employment license only, not *all* licenses. Section 3(a) ("An employer's employment license shall remain in effect provided the employer complies with the provision of this chapter."). The draft summary also incorrectly states that employees may "appeal" nonconfirmation results; however, use of this word will cause voters to mistakenly believe that employees have to initiate legal action in court to challenge a "nonconfirmation" result. The measure does not require legal action to review such a result and we suggest using the word used in the measure: "contest." For the summary to be accurate and impartial, we also believe that voters need to be informed that the measure does not apply to certain domestic employment in private homes. Section 2(c).

Finally, the draft summary states, "'Nonconfirmation' can result from employee ineligibility or incorrect information." This sentence should be removed for several reasons. First, it is not impartial, as required by ORS 250.035(2)(d), because it overemphasizes and thus distorts the likelihood that a new employee will receive a "nonconfirmation" on the basis of a mistake. Furthermore, any reference to what may cause an employee to receive a "nonconfirmation" should be balanced with a statement regarding what causes an employee to be "authorized," such as when the employee's social security number or immigration status is verified. However, we believe it is best to not include either sentence because they go beyond the text of the measure and rely on extraneous information. ORS 250.035(2)(d) requires the summary to summarize the measure, and IP 52 contains no reference to "incorrect information"

resulting in a "nonconfirmation." The source of this information is unclear and its inclusion is improper.

To address these issues, we suggest the below summary:

Summary: Federal law requires employers to verify employees' legal authorization to work in United States based on citizenship and immigration status; allows states to require use of federal web-based E-Verify program to verify employment authorization. Measure requires and automatically imputes employment licenses to employers, requires employers with five or more employees to use E-Verify to confirm employment authorization for new employees. E-Verify program notifies employer whether employee is "authorized" to work or issues "nonconfirmation." Employee may contest "nonconfirmation," employers prohibited from taking adverse employment actions during contest. Measure does not apply to certain domestic employment in homes. Employment Department shall provide technical advice. Secretary of State shall report penalties to federal immigration authorities, for repeated violations may suspend employment license for thirty days to one year.

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

Davis Wright Tremaine LLP

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October 14, 2015

VIA EMAIL– irrlistnotifier.sos@state.or.us

Elections Division
Office of the Secretary of State
255 Capitol St NE, Ste 501
Salem, OR 97310

Re: Public Comment on Proposed IP 52

Dear Secretary Atkins:

On behalf of David Rogers (Executive Director of the American Civil Liberties Union of Oregon), Rev. Joseph Santos-Lyons (Executive Director of the Asian and Pacific American Network of Oregon), Kayse Jama (Executive Director of the Center for Intercultural Organizing), Andrea Miller (Executive Director of CAUSA), Bill Perry, and Jeff Stone (Executive Director of the Oregon Association of Nurseries), all registered Oregon voters, we are providing the following comments on the draft ballot title.

The Secretary of State issued the following draft ballot title September 30, 2015, which the Secretary received from the Attorney General September 30, 2015:

Requires "employment license" for employers; conditions license on using specified federal program for employment authorization

Result of "Yes" Vote: "Yes" vote "imputes" (undefined) "employment license" to employers; license required to employ any person. License requires verifying new employee's employment authorization using specified federal program.

Result of "No" Vote: "No" vote maintains current law requiring employer to confirm employee's employment authorization without using specified federal program.

Summary: Existing law requires employers to confirm employee's employment authorization; can use Form I-9. Measure "imputes" "employment license" to all employers. Requires

employers with five or more employees to verify new employee's employment authorization using internet-based federal program/successor program. Prohibits employing any person if employer's "employment license" or other "license" (defined) suspended/revoked. Penalties for noncompliance include suspension of all "licenses" by Secretary of State, prohibiting employment of any person. Required federal program indicates employment is "authorized" or issues "nonconfirmation." "Nonconfirmation" can result from employee ineligibility or incorrect information. Employee may appeal "nonconfirmation;" adverse employment action prohibited during appeal. Oregon Employment Department shall provide technical advice, access to federal program. Secretary of State shall report penalties to federal immigration authorities. Exceptions. Other terms.

COMMENTS ON DRAFT TITLE

We appreciate the challenge the Attorney General faces under ORS 250.035 when addressing a measure with the many inherent ambiguities that IP 52 contains; nevertheless, as explained below in more detail, the draft ballot title does not satisfy the legal requirements of ORS 250.035 because the draft ballot title fails to identify certain major subjects and effects of the measure, as well as certain ambiguities in the measure. The draft title complies with ORS 250.035 except in the following ways.

CAPTION

The draft caption provides:

Requires "employment license" for employers; conditions license on using specified federal program for employment authorization

ORS 250.035(2)(a) provides that the ballot title caption must contain "not more than 15 words that reasonably identif[y] the subject matter of the state measure." The caption is the "cornerstone for the other portions of the ballot title." *Greene v. Kulongoski*, 322 Or 169, 175, 903 P2d 366 (1995). As the "headline" for the ballot title, the caption "provides the context for the reader's consideration of the other information in the ballot title." 322 Or at 175. A caption complies substantially with the requirements of ORS 250.035(2)(a) if the caption identifies the subject matter of the proposed measure in terms that will not confuse or mislead * * * voters. 322 Or at 174-75.

The "subject matter" of a measure, as that term is used in ORS 250.035(2)(a), must be determined with reference to the "significant changes" that would be brought about by the measure. *Phillips v. Myers*, 325 Or 221, 226 (1997).

The draft caption suffers from three specific problems that then flow through other sections of the draft title.

First, the caption uses the term "requires," as opposed to the term "imputes," which is used in the measure. The latter term is more accurate, as the term "requires" suggests that affirmative action is necessary on the part of a business to obtain a license. *See* http://www.merriam-webster.com/dictionary/require (defining "require" as "to impose a compulsion or command on : compel"). Under the measure, all employers in Oregon will obtain an "Oregon employment license" without any action whatsoever, making the term "imputes" less misleading than "requires."

Relatedly, the caption fails to identify from whom the "employment license" will issue, a significant component of the measure given that many licenses required for employers issue from municipalities. *E.g.* City of Portland Code Chapter 7.02 "Business License Law," *available at:* http://www.portlandonline.com/auditor/index.cfm?c=28807. That the new license created by the measure is a state license is an important change that voters should understand.

Finally, the caption fails to address a major change the measure would make to Oregon law—removing the ability to employ employees when *any* "license" as defined in the measure is "suspended or revoked." The term "license" broadly includes "any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency or political subdivision of this state for the purpose of operating a business in this state * * * including employment licenses, articles of organization, articles of incorporation, a certificate of partnership, a partnership registration, a certificate to transact business, or similar form of authorization, and any transaction privilege license." Under current law, employers who fail to maintain "articles of organization," "partnership registrations," or other filings are not subject to revocation of the right to employ workers. The measure provides a significant, new consequence for failing to maintain administrative filings that previously carried minor consequences. *E.g.* City of Portland Code Chapter 7.02.700 D (providing for a $100.00 fine for failing to timely register a business with the City of Portland), *available at:* http://www.portlandonline.com/auditor/index.cfm?c=28807&a=210587. Voters should be informed of significant new penalties introduced by the measure.

The following are ways that a caption could address some, if not all, of the problems with the draft caption:

"Imputes" new state "employment license"; employing workers conditioned on employment authorization through federal program; penalties

RESULT OF "YES" VOTE

"ORS 250.035(2)(b) and (c) require 'simple understandable' statements of not more than 25 words that describe the result if voters approve the proposed measure and if they reject it." *Wyant/Nichols v. Myers*, 336 Or 128, 138 (2003). 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 (2004). The yes statement builds upon the caption. *Hamilton v. Myers*, 326 Or 44, 51 (1997).

The draft yes statement reads as follows:

> **Result of "Yes" Vote:** "Yes" vote "imputes" (undefined) "employment license" to employers; license required to employ any person. License requires verifying new employee's employment authorization using specified federal program.

The yes statement solves one of the problems in the caption, carries forward the other problem, and introduces additional problems.

First, the yes statement, unlike the caption, correctly recognizes that the term "imputes" best captures the measure's effect.[1] Second, the yes statement, like the caption, should inform voters that the new license is "imputed" by the state itself.

Third, the terms "employer," "employment," and "employee" are specially defined in the measure and have varying and distinct meanings under Oregon law. *Compare* ORS 659A.090 (defining "employer" and "employee" for the purposes of the Oregon Military Family Leave Act); *with* ORS 653.010 (3) (defining "employer," for purposes of minimum wage law, as "any person who employs another person"), *and* ORS 653.010(2) (defining "employ" as

[1] The yes statement correctly identifies that the term "imputes" is undefined. Commenters submit that the use of quotation marks around the term is sufficient to indicate that the term is undefined, without requiring the omission of any other words from the statement. *See Morgan v. Myers*, 342 Or 165, 169, 149 P3d 1160 (2006).

including "to suffer or permit work"); *and* ORS 657.030(1) (defining "employment" for purposes of the Employment Department Law). Voters should be informed that the measure utilizes specially defined terms to delineate the scope of "employer," "employment," and "employee." *See Carley v. Myers*, 340 Or 222, 229, 132 P3d 651 (2006).

Finally, the yes statement, like the caption, fails to inform voters of the significant new penalties for failing to maintain administrative filings with all levels of government.

One way to address some of the concerns raised about the yes statement is:

> **Result of "Yes" Vote:** "Yes" vote "imputes" new state "employment license" to employers; employing workers conditioned on authorization through federal program; penalties include revoking ability to employ any employees.

RESULT OF "NO" VOTE

The Attorney General issued the following draft no statement:

> **Result of "No" Vote:** "No" vote maintains current law requiring employer to confirm employee's employment authorization without using specified federal program.

ORS 250.035(2)(c) requires the no statement to "us[e] the same terms" as the yes statement "to the extent practical." ORS 250.035(3) reinforces the requirement by requiring that the no and yes statements "be written so that, to the extent practicable, the language of the two statements is parallel." However, the no statement should not simply rephrase, in the negative, the yes statement. *See Terhune v. Myers*, 342 Or 136, 143, 149 P3d 1139 (2006). The no statement should endeavor to describe the current state of the law.

The draft no statement does not comply with ORS 250.035(2)(c) because the statement does not provide sufficient information about current law in relation to the changes IP 52 purports to make, and because it improperly emphasizes what employers *do not* currently have to do (use a federal program for employment authorization) as opposed to what *they do* have to do (verify identity and employment eligibility).

The biggest change proposed by the measure is imputing a new license to every business in Oregon and requiring that license (and all other defined "licenses") to be maintained in order to employ employees. Voters should understand that a no vote retains the status quo, whereby no state-imputed license is required in order to employ employees.

Relatedly, voters should understand that a no vote does not simply relieve the requirement to use the specified federal program. As correctly recognized in the summary, employers are presently required to verify an employee's identity and eligibility for employment by examining specified forms of documentation and may document compliance via form I9. *See* 8 USC § 1324a(b). The no statement should, therefore, emphasize employers' current requirements, as opposed to emphasizing the lack of the measure's new requirements.

In order for the statement to add accurate context, one option would be:

> **Result of "No" Vote:** "No" vote maintains current law requiring employer to confirm employee's identity and employment authorization with specified documentation; no additional state employment license needed to employ.

SUMMARY

The Attorney General issued the following draft summary:

> **Summary:** Existing law requires employers to confirm employee's employment authorization; can use Form I-9. Measure "imputes" "employment license" to all employers. Requires employers with five or more employees to verify new employee's employment authorization using internet-based federal program/successor program. Prohibits employing any person if employer's "employment license" or other "license" (defined) suspended/revoked. Penalties for noncompliance include suspension of all "licenses" by Secretary of State, prohibiting employment of any person. Required federal program indicates employment is "authorized" or issues "nonconfirmation." "Nonconfirmation" can result from employee ineligibility or incorrect information. Employee may appeal "nonconfirmation;" adverse employment action prohibited during appeal. Oregon Employment Department shall provide technical advice, access to federal program. Secretary of State shall report penalties to federal immigration authorities. Exceptions. Other terms.

The summary carries forward problems of the caption, yes statement, and no statement.

In particular, the summary fails to adequately inform voters of the measure's major effects as required by ORS 250.035(2)(d). As with the no statement, the summary should inform voters that current law does not require a state license for employers to hire employees. As in the yes statement, the Attorney General should alert voters to the extent to which IP 52 proposes terms that are not defined and that (1) are also not defined anywhere in Oregon law, or (2) defined differently in current Oregon law.[2]

In addition, the summary uses the term "appeal," instead of the term "contest," as used in the measure. The term "appeal" connotes an impartial review, whereas both the measure and the federal program only allow a right to "contest," which is a secondary review through the same federal program. *See* 8 USC § 1324(a) (Note).

The summary also fails to inform voters that employers may not simply verify their employees' authorization with the specified federal program. Access to the federal program requires, among other things, enrollment with U.S. Citizenship and Immigration Services ("USCIS"), entering into a Memorandum of Understanding with USCIS, and identifying a program administrator. *See* "Quick Reference Guide for E-Verify Enrollment," (2012) available at: http://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/Publications/Guides/guide-enrollment.pdf. Voters should be informed that a major effect of the measure will be that, in order to employ workers, all employers will be required to register with the federal government in order to utilize the required program.

Finally, the summary fails to inform voters that businesses may be required to "verify the employment authorization" of volunteers. The measure, which covers all "employees," defines an "employee" as "an individual who provides services or labor for an employer for wages or other remuneration" who is not an independent contractor. Accordingly, any volunteer who provides services or labor and receives "other remuneration" may be an "employee" under the measure, and her eligibility must be "verified" in order for a business to retain its employment license. *Cf. Waisgerber v. City of Los Angeles*, 406 Fed Appx 150, 2010 WL 5177500 at *2 (9th Cir 2010) (unpublished disposition) ("[T]he fact that a person is not paid a salary does not necessarily foreclose the possibility that the person is an 'employee' for purposes of federal statutes.") (collecting cases)).

[2] The summary appropriately notes that the term "license" is defined in the measure.

An alternative summary that might address some, if not all, of these concerns would read:

> **Summary**: Existing law requires employers confirm employee's employment authorization; can use Form I-9; no license needed to employ employees. Measure "imputes" new employment license to employers. Requires employers with five or more employees to register with and verify new employees' employment authorization using specified federal program. Employees may include volunteers. Prohibits employing any person if employer's employment license or any other "license" (defined) suspended/revoked. Penalties include prohibition on employing any persons, suspension of all "licenses." Federal program indicates employment is "authorized" or issues "nonconfirmation." "Nonconfirmation" can result from employee ineligibility or incorrect information. Employee may "contest" (undefined) "nonconfirmation"; adverse employment action prohibited during contest. Oregon Employment Department to provide advice, access to federal program. Secretary of State shall report penalties to federal authorities. Exceptions. Other terms.

Thank you for your consideration.

Very truly yours,

Davis Wright Tremaine LLP

GAC/TC/jan

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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(503) 986-1518

CONSTITUTIONAL REQUIREMENT RULING

Initiative Petition No.	Date Filed	Comment Deadline	Certified Ballot Title Due
2016-052	August 27, 2015	October 14, 2015	October 29, 2015

Draft Ballot Title Caption

Requires "employment license" for employers; conditions license on using specified federal program for employment authorization

Chief Petitioners

Sal Esquivel	11 Corning Ct Medford, OR 97504
James Ludwick	7500 SW Lebold Rd McMinnville, OR 97128
Mike Nearman	2570 Greenwood Rd S Independence, OR 97351

Procedural Constitutional Requirement Commentors

None

Certification

I have reviewed the above-captioned initiative petition, including any comments submitted regarding constitutional requirements, and find that:

☑ It **complies** with the procedural constitutional requirements.

☐ It **does not comply** with the procedural constitutional requirements.

10/29/15

Jeanne Atkins, Secretary of State — **Dated**

OFFICE OF THE SECRETARY OF STATE

JEANNE P. ATKINS
SECRETARY OF STATE

ROBERT TAYLOR
DEPUTY SECRETARY OF STATE

ELECTIONS DIVISION

JIM WILLIAMS
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(503) 986-1518

INITIATIVE PETITION

TO: All Interested Parties

FROM: Lydia Plukchi, Compliance Specialist

DATE: October 29, 2015

SUBJECT: Initiative Petition **2016-052** Certified Ballot Title

The Elections Division received a certified ballot title from the Attorney General on October 29, 2015, for Initiative Petition **2016-052**, proposed for the November 8, 2016, General Election.

Caption

"Imputes" "employment license" to employers; conditions "license" on using specified federal program for employment authorization

Chief Petitioners

Sal Esquivel	11 Corning Ct Medford, OR 97504
James Ludwick	7500 SW Lebold Rd McMinnville, OR 97128
Mike Nearman	2570 Greenwood Rd S Independence, OR 97351

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
November 13, 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

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, Ste. 501
Salem, OR 97310

Re: Proposed Initiative Petition — "Imputes" "Employment License" to Employers; Conditions "License" on Using Specified Federal Program for Employment Authorization
DOJ File #BT-52-15; Elections Division #2016-052

Dear Mr. Williams:

We received comments on the Attorney General's draft ballot title for Initiative Petition 52 (2016) (IP 52) from Cynthia Kendoll (through counsel, Jill Gibson) and from David Rogers, Rev. Joseph Santos-Lyons, Kayse Jama, Andrea Miller, Bill Perry, and Jeff Stone (through counsel, Tim Cunningham). Both sets of commenters object to all parts of the draft ballot title.

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

A. The Caption

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

Requires "employment license" for employers; conditions license on using specified federal program for employment authorization

1. Comments from Ms. Kendoll

Ms. Kendoll contends that the caption fails to reasonably identify the primary subject matter of the proposed measure. She asserts that the "actual major effect is requiring employers to verify that an employee's citizenship and immigration status authorizes 'employment.'"

(Kendoll Letter 3). She asserts that the caption focuses on the enforcement mechanism for the proposed measure—the "employment license"—instead of the measure's primary effect. (*Id.*). Ms. Kendoll also contends that the phrase "using specified federal program for employment authorization" is unclear and confusing. She proposes the following caption: "Requires employers to verify new employees' authorization to work in United States using E-Verify program[.]" (*Id.*).

2. Comments from Mr. Rogers, Rev. Santos-Lyons, Mr. Jama, Ms. Miller, Mr. Perry, and Mr. Stone

Mr. Rogers, *et al.*, contend that the caption is flawed in three ways. First, they observe that the caption uses the term "requires" where the measure uses the term "imputes." They contend that "requires" is inaccurate because it "suggests that affirmative action is necessary on the part of a business of obtain a license," when the measure does not require any such action. (Rogers Letter 3). Second, they observe that the caption fails to identify the state as the governmental entity "from whom the 'employment license' will issue." (*Id.*). Third, they contend that the caption fails to address the penalties imposed by the proposed measure. (*Id.*). They propose the following caption: "'Imputes' new state 'employment license'; employing workers conditioned on employment authorization through federal program; penalties[.]" (*Id.* at 4)

3. Our Response to the Comments

After considering the comments, we agree that the caption should be revised.

Regarding Ms. Kendoll's comments, we disagree that the caption fails to describe the actual major effect of the proposed measure. We determine the "actual major effect" of a measure by considering the "changes that the proposed measure would enact in the context of existing law." *Rasmussen v. Kroger*, 350 Or. 281, 285, 253 P.3d 1031 (2011). Where a measure has multiple important effects, the caption cannot focus solely on one "highly generalized aspect" of the measure. *McCann v. Rosenblum*, 354 Or 701, 707, 320 P3d 548 (2014). Here, the measure creates a new "employment license" for all Oregon employers, requires the license to employ any person, and conditions that license on verifying new employees' authorization. The creation of the employment license is a major effect and so must be included in the caption.

We also disagree with Ms. Kendoll's suggestion that "specified federal program" is misleading and should be replaced with "E-Verify." The proposed measure uses the term "employment authorization program," which is defined as E-Verify or "any successor program." Section 2(d). Elsewhere the measure uses the term "federal government employment authorization program." Sections 2(h), 3(b). "Specified federal program" accurately reflects the text of the proposed measure.

Regarding comments from Mr. Rogers, *et al.*, we agree that "imputes" is more accurate than "requires." We also agree that the caption should notify voters that other licenses, in addition to the employment license, are implicated by the measure. We disagree that the caption

must identify the state as the licensing entity and include the word "penalties." Those details are adequately addressed in the modified "yes" result and summary, as discussed below.

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

"Imputes" "employment license" to employers; conditions "license" on using specified federal program for employment authorization

B. The "Yes" Vote Result Statement

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

> **Result of "Yes" Vote:** "Yes" vote "imputes" (undefined) "employment license" to employers; license required to employ any person. License requires verifying new employee's employment authorization using specified federal program.

1. Comments from Ms. Kendoll

Ms. Kendoll contends that the "yes" vote result statement fails to reasonably identify the subject matter of the proposed measure, which is the same objection she had regarding the caption. (Kendoll Letter 4). She also objects to the use of quotation marks around "imputes" and to the inclusion of "(undefined)" to modify "imputes." (*Id.*). She asserts that "impute" has its ordinary meaning and so should not be placed in quotation marks and labeled "undefined." (*Id.*) She proposes the following "yes" result statement: "'Yes' vote requires employers to use federal E-Verify program to verify new employees' authorization to work in United States in order to maintain employment license." (*Id.*).

2. Comments from Mr. Rogers, Rev. Santos-Lyons, Mr. Jama, Ms. Miller, Mr. Perry, and Mr. Stone

Mr. Rogers, *et al.*, contend that the "yes" result statement should inform voters that the state is the governmental entity "imputing" the employment license. (Rogers Letter 4). They contend that "impute" does not need to be modified by "(undefined)" because quotation marks are sufficient to alert voters that term is undefined. They note that "employer," "employment," and "employee" are defined by the measure and believe voters should be informed of that fact. (*Id.* at 5). Finally, they contend that the proposed "yes" result statement fails to describe significant new penalties imposed against employers "for failing to maintain administrative filings at all levels of government." (*Id.*). They propose the following result statement: "'Yes' vote 'imputes' new state 'employment license' to employers; employing workers conditioned on authorization through federal program; penalties include revoking ability to employ any employees." (*Id.*)

3. Our Response to the Comments

After considering the comments, we agree that the "yes" result statement should be revised.

We agree with Ms. Kendoll and with Mr. Rogers, *et al.*, that "impute" does not need to be modified by "(undefined)." We agree with Mr. Rogers, *et al.*, that the quotation marks around "impute" are sufficient to signal that the term is undefined.

We disagree with Ms. Kendoll that the quotation marks should be removed from "impute." "Impute" is not defined by the measure but the term denotes one of the measure's key effects. Although "impute" may carry its ordinary meaning, what it means for a license to be "imputed" is still unclear. Ms. Kendoll notes that "impute" means "to attribute accusingly" or "to credit or ascribe to a person or cause." Applying those definitions, it is not clear what "attributing," "crediting," or "ascribing" a license to a business means. We are unaware of any existing Oregon statute that "imputes" a license (or any other legal requirement) to a person or business. Additionally, the measure does not indicate what agency "imputes" the license to a business or describe any process for "imputing" a license. Based on those ambiguities, quotation marks around "impute" are appropriate. *See Morgan v. Meyers*, 342 Or 165, 149 P3d 1160 (2006) (requiring quotation marks around critical term that is undefined by the measure). We also disagree with Ms. Kendoll's assertion that the "yes" result statement focuses improperly on the license requirement, as discussed in our response regarding the caption.

Regarding the comments from Mr. Rogers, *et al.*, we agree that the "yes" result should notify voters that the measure has impacts on other "licenses." As defined in Section 2(g), "license" is broadly defined; under Sections 3(a) and 4(b), those "licenses" must be in effect for an employer to employ any person and those license may be revoked if an employer fails to confirm new employees authorization for employment using E-Verify. We disagree that the "yes" must identify the state as the entity imputing the license. That issue is adequately addressed in the summary.

In light of the comments concerning the draft "yes" result statement, we modify the statement as follows:

> **Result of "Yes" Vote:** "Yes" vote "imputes" "employment license" to employers; "license" (defined) required to employ any person. "License" conditioned on verifying new employee's employment authorization using federal program.

C. The "No" Vote Result Statement

We next consider the draft "no" vote result statement. A ballot title must include "[a] simple and understandable statement of not more than 25 words that describes the result if the state measure is rejected." ORS 250.035(2)(c). 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 maintains current law requiring employer to confirm employee's employment authorization without using specified federal program.

1. Comments from Ms. Kendoll

Ms. Kendoll contends that the "no" vote statement is inaccurate and misleading because "the results statement must address *state* law, not federal law, and there is no current state law requiring verification of employment authorization." (Kendoll Letter 5). She proposes the following "no" result statement: "'No' vote maintains current state law not requiring employers to verify new employees' legal authorization to be employed in the United States."

2. Comments from Mr. Rogers, Rev. Santos-Lyons, Mr. Jama, Ms. Miller, Mr. Perry, and Mr. Stone

Mr. Rogers, *et al.*, contend that the "no" result statement does not adequately describe the current federal law—which requires an employer to confirm employment eligibility using certain documentation—in relation to the changes proposed by the measure. (Rogers Letter 5). They also contend that the "no" statement should clarify for voters that a "no" vote maintains "the status quo, whereby no state-imputed license is required in order to employ employees." (*Id.*). They propose the following: "'No' vote maintains current law requiring employer to confirm employee's identity and employment authorization with specified documentation; no additional state employment license needed to employ." (*Id.*).

3. Our Response to the Comments

After considering the comments, we agree that the "no" result statement should be revised.

We disagree with Ms. Kendoll that the "no" result statement may not address federal law. The "no" result statement must "address[] the substance of current law *on the subject matter of the proposed measure*." *Novick/Crew*, 337 Or at 577 (emphasis original). Here, federal law is the current law on the subject matter. Ms. Kendoll's proposed "no" statement is inaccurate because employers currently are required to verify employment authorization under federal law.

We agree with Mr. Rogers, *et al.*, that the "no" result statement could more accurately describe current law by informing voters that current law requires employers to confirm authorization using certain documentation. We also agree that the "no" result statement should reflect that use of E-Verify will not be required nor will a new license be created.

We modify the "no" result as follows:

> **Result of "No" Vote:** "No" vote maintains current law requiring employer to confirm employee's employment authorization using documentation; current law does not require "employment license" or using specified program.

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:** Existing law requires employers to confirm employee's employment authorization; can use Form I-9. Measure "imputes" "employment license" to all employers. Requires employers with five or more employees to verify new employee's employment authorization using internet-based federal program/successor program. Prohibits employing any person if employer's "employment license" or other "license" (defined) suspended/revoked. Penalties for noncompliance include suspension of all "licenses" by Secretary of State, prohibiting employment of any person. Required federal program indicates employment is "authorized" or issues "nonconfirmation." "Nonconfirmation" can result from employee ineligibility or incorrect information. Employee may appeal "nonconfirmation;" adverse employment action prohibited during appeal. Oregon Employment Department shall provide technical advice, access to federal program. Secretary of State shall report penalties to federal immigration authorities. Exceptions. Other terms.

1. Comments from Ms. Kendoll

Ms. Kendoll contends that the summary is deficient in the same ways the caption and result statements are deficient and that the summary fails to identify the actual major effect of the proposed measure. (Kendoll Letter 5-6). She would replace references to "federal program" with "federal E-Verify program." (*Id.* at 6). She also contends that the summary is inaccurate in several respects. First, she asserts that the proposed measure does not include the suspension of "all 'licenses'" as a penalty for noncompliance. (*Id.*) Second, she asserts that the word "appeal" is misleading because it suggests the involvement of a court and that "contest" is word used in the measure. Third, she asserts that voters should be informed that the measure does not apply to certain domestic employment in private homes. Finally, she objects that the draft's explanation of why a "nonconfirmation" can occur is not impartial. (*Id.* 6-7). Ms. Kendoll proposes a revised summary that she believes would address her concerns. (*Id.* at 7).

2. Comments from Mr. Rogers, Rev. Santos-Lyons, Mr. Jama, Ms. Miller, Mr. Perry, and Mr. Stone

Mr. Rogers, *et al.*, contend that the problems with the caption and result statements carry over into the summary. Specifically, they contend that the summary fails to describe the measure's major effects because the summary does not inform voters that current law does not require an employment license and because the summary does not note certain undefined terms in the measure. (Rogers Letter 7). They also assert that the summary should inform voter that the measure requires employers to register with the federal government to use the required program. They also contend that "appeal" should be replaced with "contest." Finally, they contend that the summary fails to note that the measure may apply to volunteers. (*Id.*). Mr. Rogers, *et al.*, propose a revised summary they believe would address their concerns. (*Id.* at 8).

3. Our Response to the Comments

After considering the comments, we agree that the summary should be revised.

We agree with Ms. Kendoll and Mr. Rogers, *et al.*, that the word "appeal" should be replaced with "contest," because "contest" is the term used in the measure. We agree with Mr. Rogers, *et al.*, that the summary should clarify that an employment license is not currently required by state law and that the license would be imputed by the state. We also agree with Mr. Rogers, *et al.*, that the summary should notify voters that employers will be required to register with the federal program.

Concerning Ms. Kendoll's comments, we disagree that the draft summary inaccurately describes the penalties for noncompliance. Section 4 provides that "An employer who does not comply with the requirements of the Act violates the employer's license." Section 4(a) places an employer on "probation" for a first violation of the measure. Section 4(b) provides that, "For a subsequent violation, the Secretary of State shall suspend the employer's license." Ms. Kendoll contends that the phrase "employer's license" refers only to the employer's "*employment* license" and not any other license an employer must possess. The measure, however, specifically defines "license" as "any agency permit, certificate, approval, registration, charter, or similar form of authorization that is required by law and that is issued by any agency or political subdivision of this state for the purpose of operating a business in this state[.]" Section 2(g). Based on the plain text of the measure, the phrase "employer's license" incorporates the broad definition of "license." We note that other parts of the measure use the phrase "employer's employment license" when referring to the specific employment license created by the measure, but Section 4 uses the broader phrase "employer's license" instead. *See* Section 3(a) ("An *employer's employment license* shall remain in effect provided the employer complies with the provisions of this chapter.") (Emphasis added).

We also disagree with Ms. Kendoll's objection to the explanation of "nonconfirmation." Section 3(c) notes that a "Tentative Nonconfirmation" is one possible result of submitting a new employee's name and information to the E-Verify program. The explanation for why a "nonconfirmation" could result provides important context and also explains why an employee would need to "contest" the result. We also disagree that the summary must describe the exception for casual domestic employment; other more important effects of the measure take priority for the limited space allotted for the summary.

Concerning the comments by Mr. Rogers, *et al.*, we disagree that the summary must state that the definition of employee may apply to volunteers. Although they may be correct regarding the application of the measure to volunteers, that is not a major effect of the measure and, in light of the other major effects that appear on the face of the measure and require explanation, does not need to be included in the summary.

In light of the comments, we modify the summary as follows:

Summary: Existing law requires employers to confirm employee's employment authorization; can use Form I-9. Measure "imputes" new state "employment license" to all employers. Requires employers with five or more employees to verify new employee authorization using internet-based federal program. Prohibits employing any person if employer's "employment license" or other "license" (defined) suspended/revoked. Penalties for noncompliance include suspension of all "licenses" by Secretary of State, prohibiting employment of any person. Required federal program indicates employment is "authorized" or issues "nonconfirmation." "Nonconfirmation" can result from employee ineligibility/ incorrect information. Employee may "contest" "nonconfirmation;" adverse employment action prohibited during contest. Employers must register with federal program; Oregon Employment Department shall provide technical advice, access. Secretary of State shall report penalties to federal immigration authorities. Exceptions. Other terms.

E. Conclusion

We certify the attached ballot title.

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Enclosure

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Certified by Attorney General on October 29, 2015.

BALLOT TITLE

"Imputes" "employment license" to employers; conditions "license" on using specified federal program for employment authorization

Result of "Yes" Vote: "Yes" vote "imputes" "employment license" to employers; "license" (defined) required to employ any person. "License" conditioned on verifying new employee's employment authorization using federal program.

Result of "No" Vote: "No" vote maintains current law requiring employer to confirm employee's employment authorization using documentation; current law does not require "employment license" or using specified program.

Summary: Existing law requires employers to confirm employee's employment authorization; can use Form I-9. Measure "imputes" new state "employment license" to all employers. Requires employers with five or more employees to verify new employee authorization using internet-based federal program. Prohibits employing any person if employer's "employment license" or other "license" (defined) suspended/revoked. Penalties for noncompliance include suspension of all "licenses" by Secretary of State, prohibiting employment of any person. Required federal program indicates employment is "authorized" or issues "nonconfirmation." "Nonconfirmation" can result from employee ineligibility/ incorrect information. Employee may "contest" "nonconfirmation;" adverse employment action prohibited during contest. Employers must register with federal program; Oregon Employment Department shall provide technical advice, access. Secretary of State shall report penalties to federal immigration authorities. Exceptions. Other terms.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on December 4, 2015, I directed the original Respondent's Answering Memorandum to Petition to Review Ballot Title Re: Initiative Petition No. 52 to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and served upon Jill Odell Gibson, attorney for petitioner Cynthia Kendoll, by using the court's electronic filing system.

I further certify that on December 4, 2015, I directed the Respondent's Answering Memorandum to Petition to Review Ballot Title Re: Initiative Petition No. 52 to be served upon Sal Esquivel, James H. Ludwick, and Mike Nearman, chief petitioners, by mailing a copy, with postage prepaid, in an envelope addressed to:

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