

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.

LAWYERS

Steven C. Berman  
of Counsel

January 27, 2005

BILL BRADBURY  
SECRETARY OF THE STATE

2005 JAN 27 PM 3:30

RECEIVED

**Via Facsimile and Regular Mail**

Bill Bradbury  
Secretary of State  
Elections Division  
Room 141 State Capitol  
Salem, OR 97310-0722

Re: **Draft Ballot Title for Initiative Petition No. 17 for the General Election of November 7, 2006.**

Dear Secretary Bradbury:

This firm represents Art Towers, Political Director of SEIU Local 503, regarding the ballot title for Initiative Petition No. 17 for the general election of November 7, 2006. Mr. Towers is an elector in the State of Oregon, and these comments are provided on his behalf, in his capacity as an elector. This letter is written in response to your office's press release, dated January 5, 2005, which invites comments on the draft ballot title to initiative petition no. 17.

Initiative Petition No. 17 ("the Initiative") would enact an Oregon constitutional amendment. The purported purpose of the Initiative is to restrict how a person, company or organization may use employee payroll deducted funds.<sup>1</sup> Section 1 of the Initiative prohibits the use of any employee payroll deducted funds for "political purposes" unless the employer has on file a current, written authorization from each employee authorizing such deductions. The initiative petition then contains eight subsections. Subsection (a) defines money used for political purposes to include any funds, including in-kind and pass-through contributions, contributed to a political candidate for public office, a political party, or in favor or opposed to a ballot measure. Subsection (b) excludes money spent on lobbying elected officials, unless those funds are spent within 90 days of an election. Subsection (c) provides that the employee's authorization shall be written and renewed annually on a specific form. Subsection (c) also requires the Legislature to enact safeguards to ensure that personal information is not contained on the form or disclosed to the public. Subsection (d) establishes a system of substantial fines

<sup>1</sup> Proposed initiative 17 is identical to proposed initiative 15, except that proposed initiative 15 applies only employee payroll deducted funds from public employers, and initiative 17 applies to all employers.

Bill Bradbury  
January 27, 2005  
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for violations of the Initiative. Subsection (e) requires that any entity using a payroll deduction for political purposes keep those funds segregated from other funds. Subsection (f) provides that any person, company or organization that co-mingles funds in violation of subsection (e) shall not be allowed to use a public payroll system to subsequently collect funds for political purposes; subsection (f) also sets forth limited exceptions to the foregoing penalty. A second subsection (f) specifies that the initiative petition does not create a right to use payroll deducted funds for political purposes. Subsection (g) is a severability clause. It also contains a provision stating that the initiative petition shall not be applied to conflict with freedom of speech, freedom of association or other rights guaranteed by the United States constitution.

**I. The Draft Ballot Title for Petition No. 17 does not Comply with the Statutory Requirements.**

**A. The Caption**

ORS 250.035(2)(a) provides that a ballot title must contain "a caption of not more than fifteen words which reasonably identifies the subject matter of the state measure."

The caption in the draft ballot title provides:

**AMENDS CONSTITUTION: PROHIBITS USING ANY EMPLOYEES' PAYROLL DEDUCTIONS FOR "POLITICAL PURPOSES" (DEFINED) WITHOUT COMPLYING WITH SPECIFIED REQUIREMENTS**

The draft caption does not comply with the requirements of ORS 250.035(2)(a) in multiple respects. In Nesbitt v. Myers, 335 Or. 219, 64 P.3d 1133 (2003), the Supreme Court addressed a proposed initiative nearly identical to this Initiative. In addressing the draft ballot title, the Court held that the main thrust of the proposed initiative is to restrict how employee payroll donations are used by recipients of those funds. 335 Or. at 224.

Pursuant to Nesbitt v. Meyers, the draft ballot title fails to convey who will be affected by the restrictions in the Initiative. Because the proposed initiative applies to all possible recipients of employee payroll deductions, some form of inclusive language must be included in the caption. The caption should identify the fact that the restrictions apply to all individuals, companies and organizations.

The phrase "specified requirements" also is unduly ambiguous. The Initiative would require explicit employee authorization, in the form of an annual, written statement from the employee. Because the Initiative would impose some burden on employees (and employers who

wish to accommodate payroll deduction requests), the extent of those restrictions should be conveyed in some manner to the voters.

Finally, the phrase "'POLITICAL PURPOSES' (DEFINED)" is redundant. The fact that "political purposes" is in quotation marks indicates that it is a term of art. The additional parenthetical "defined" is, therefore, unnecessary.

A more appropriate caption would read:

AMENDS CONSTITUTION: PROHIBITS ORGANIZATIONS,  
INDIVIDUALS FROM USING PAYROLL DEDUCTIONS FOR "POLITICAL  
PURPOSES" WITHOUT EMPLOYEES' ANNUAL WRITTEN  
AUTHORIZATION

**B. The Yes/No Statements**

ORS 250.035(2)(b) requires that the "yes" and "no" statements in a ballot title contain "simple and understandable statement[s] of not more than 25 words that describe[] the result if the measure is" approved or rejected.

The "yes" and "no" statements in the draft ballot title are flawed for the same reasons that the caption is flawed.

An additional flaw in the "yes" statement in the draft ballot title is the use of the word "anyone." The Initiative applies to all individuals, companies and organizations. The word "anyone" is defined as "any person." American Heritage Dictionary 38 (3<sup>rd</sup> ed. 1994). In other words, the use of the word "anyone" inaccurately narrows only to individuals the range of the Initiative.

The "yes" statement in the draft ballot title also uses the plural possessive "employees' payroll deductions," which, again, is misleading. The Initiative, by its own terms, applies to all payroll deductions by all individual employees. It addresses individual determinations. The plural phrase "employees' payroll deductions" implies that the deductions are always collective and unified.

The "no" statement in the draft ballot title is misleading, because it again fails to convey that the proposed Initiative would affect individuals, organizations and companies, rather than just individuals. Also, the introduction of the phrase "segregating payroll deductions earmarked for political purposes" is confusing; it addresses a concept that has yet to be discussed in the

Bill Bradbury  
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caption and "yes" statement. In the light of the requirement that the "no" statement is supposed to parallel the "yes" statement, the phrase should be removed. Finally, as is discussed below, the "no" statement does not accurately convey the current state of the law. There are some limits as to how payroll deductions may be used, and it is inaccurate to provide otherwise.

More appropriate "yes" and "no" statements would be:

"Yes" vote prohibits all individuals, organizations from using any employee's payroll deducted funds for "political purposes" without employee's written, annual authorization, and meeting other requirements.

"No" vote retains current law allowing individuals, organizations to spend funds received through payroll deductions in the same manner as funds received by other means.

### C. The Summary

ORS 250.035(2)(d) requires that the ballot title contain a "concise and impartial statement of not more than 125 words summarizing the state measure and its major effects." The summary in the draft ballot title is deficient for the reasons listed above, and for the following additional reasons.

The summary inaccurately states that "current law neither limits use of any employees' payroll deductions nor requires segregating payroll deductions earmarked for political purposes." That is not entirely accurate. Unions cannot require employee payroll deductions to be used for political purposes. That is a "limit."

As the Supreme Court explained in Nesbitt v. Myers, the over-riding purpose of the Initiative is to restrict how employee payroll deducted funds may be used. To coerce compliance, the Initiative contains extremely harsh penalties for violations of the co-mingling and employee written authorization provisions of the Initiative. Yet, the extent of those penalties is not mentioned in the draft summary. Instead, there is an unnecessary focus on the fact that the legislature must ensure that personal information on employee authorizations is not publicly disclosed. With the given word limitations, that emphasis is misdirected.

A more appropriate summary would read:

Amends constitution. Current law allows individuals, organizations to spend funds received through payroll deductions in same manner as funds received by

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other means; unions cannot require political contributions. Measure would prohibit any employee's payroll deduction from being used for "political purposes" unless employee gives annual, written consent and meets other requirements. Money used for "political purposes" includes financial and in-kind contributions to political candidates, committees, or parties or to promote, oppose ballot measure. Political purposes do not include money spent on lobbying, unless spent on identifying public-office candidate within ninety days of election. Any money from employee payroll deductions for political purposes must be segregated. Establishes penalties for violations, including permanent ban on using payroll deductions for political purposes if Measure is violated. Other provisions.

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

Very truly yours,

Steven C. Berman

SCB:ab  
cc: client

WILLIAM & CINDY SIZEMORE  
PAGE 04  
**Bill Sizemore**  
**24200 S. Highland Crest Drive**  
**P.O. Box 343**  
**Beavercreek, OR 97004**  
**Ph 503-803-5085**

January 21, 2005

Secretary of State  
Elections Division  
Room 141 State Capitol  
Salem, OR 97310

ALL INFORMATION  
HEREIN IS UNCLASSIFIED  
DATE 01-27-05 BY 60322 UCBAW

2005 JAN 27 PM 3:40

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Dear Mr. Secretary:

As an Oregon elector, I am writing to offer my comments on the draft ballot title for Initiative #17, which prohibits payroll deductions for politics without employee consent.

I believe the draft ballot title fails to comply with ORS 250.035.

My comments on this initiative are similar to the ones I made on initiative #15, which relates only to public employees.

As with initiative #15, the draft ballot title for this initiative appears to describe a measure filed in a previous year. This measure is different in that it expressly public employers from making the payroll deduction, unless they have an employee's consent form on file.

The previous measure might have been described as a limitation on the use of the money by the party receiving the payroll-deducted money. Unlike the earlier version, the prohibition in this measure is expressly directly at the employer.

The ballot title should state:

**PROHIBITS PAYROLL DEDUCTIONS FOR POLITICAL PURPOSES  
(DEFINED) WITHOUT AN EMPLOYEE'S ANNUALLY RENEWED,  
WRITTEN AUTHORIZATION.**

#17

**Result of a Yes vote: Yes vote prohibits employers from deducting political money from an employee's paycheck without employee's annually renewed, written authorization; restricts use of payroll deducted money.**

**Result of a No vote: No vote rejects requiring annually renewed, employee authorization for payroll deductions for political purposes (defined); rejects placing restrictions on the use of payroll deducted money.**

I have no problem with the draft summary. The fact that political money must be segregated from other funds is not important enough to be placed in the caption or result statements and is adequately explained in the summary.

Sincerely,

Bill Sizemore

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BILL BRADY  
SECRETARY OF THE STATE

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LAWYERS

Steven C. Berman  
of Counsel

January 27, 2005

**Via Facsimile and Regular Mail**

Bill Bradbury  
Secretary of State  
Elections Division  
Room 141 State Capitol  
Salem, OR 97310-0722

RECEIVED  
2005 JAN 27 PM 3:31  
BILL BRADBURY  
SECRETARY OF THE STATE

Re: **Initiative Petition 17 for the November 7, 2006 General Election and Non-Compliance with the Procedural Requirements of the Oregon Constitution.**

Dear Secretary Bradbury:

I represent Art Towers (an elector and Political Director of SEIU Local 503) who is providing comments on the draft ballot title for proposed initiative petition 17, for the general election of November 7, 2006. Those comments will be provided to your office today. I also am representing SEIU Local 503 in regards to certain matters relating to initiative petition 17. On January 5, 2005, your office issued a press release seeking statements from interested persons regarding whether or not the proposed initiative petition complies with the procedural requirements of the Oregon constitution. This letter is provided on behalf of my clients in response to that press release.

Initiative petition 17 does not comply with the procedural requirements of the Oregon constitution for initiative petitions. Specifically, the initiative does not comply with: (1) the single amendment/single vote requirement in Article XVII, section 1; and (2) the full text requirement in Article IV, section 1(2)(d). Accordingly, the proposed initiative cannot appear on the ballot and certified ballot titles cannot be issued for them. Because the proposed initiative does not comply with the requirements of the Oregon constitution, your office, and the office of the Attorney General, may not take any further action regarding the proposed initiative beyond declaring that it violates Article XVII, section 1 and Article IV, section 1(2)(d).

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## I. AN OVERVIEW OF THE INITIATIVE PETITION 17.

The initiative petition purports to amend the Oregon constitution by adding a new provision to the Oregon constitution. The purpose of the Initiative is to restrict how an individual, company or organization may use employee payroll deduction funds.<sup>1</sup> Section 1 of the initiative petition prohibits any public employee payroll deducted funds to be used for "political purposes" unless the employer has on file a current, written authorization from each employee authorizing such deductions. The initiative petition then contains eight subsections. Subsection (a) defines money used for a political purpose as any funds, including in-kind and pass-through contributions, contributed to a political candidate for public office, a political party, or in favor or opposed to a ballot measure. Subsection (b) excludes money spent on lobbying elected officials, unless those funds are spent within 90 days of an election. Subsection (c) provides that the employee's authorization shall be written and renewed annually on a specific form. Subsection (c) also requires the Legislature to enact safeguards to ensure that personal information is not contained on the form or disclosed to the public. Subsection (d) establishes a system of fines for violations of the initiative petition. Subsection (e) requires that any entity using employee payroll deducted funds for political purposes keep those funds segregated from other funds. Subsection (f) provides that any person, company or organization that co-mingles funds from public payroll systems in violation of subsection (e) shall not be allowed to use a public payroll system to subsequently collect funds for political purposes; subsection (f) also sets forth limited exceptions to the foregoing penalty. A second subsection (f) specifies that the initiative petition does not create a right to use payroll deductions for political purposes. Subsection (g) is a severability clause. It also contains a provision stating that the initiative petition shall not be applied to conflict with freedom of speech, freedom of association or other rights guaranteed by the United States constitution.

## II. THE SINGLE AMENDMENT/SINGLE VOTE REQUIREMENT IN ARTICLE XVII, SECTION 1, OF THE OREGON CONSTITUTION.

### A. Article XVII, Section 1.

Article XVII, section 1 of the Oregon constitution "sets out procedural requirements \* \* \* as well as other requirements that apply to amendments submitted to the voters by legislative proposal or initiative petition." Armatta v. Kitzhaber, 327 Or. 250, 256 (1998). Article XVII, section 1 provides, in pertinent part:

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<sup>1</sup>Proposed initiative 17 is identical to proposed initiative 15, except that proposed initiative 17 applies to all employers, not just public employers.

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When two or more amendments shall be submitted \* \* \* to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately.

The single amendment/single vote requirement applies both to amendments referred to the voters by the legislature and to amendments proposed by initiative petition. Armatta, 327 Or. at 259. The Oregon courts strictly construe the single amendment/single vote requirement and frequently have rejected initiative petitions that have run afoul of that provision. See, e.g., Lincoln Interagency Narcotics Team v. Kitzhaber, 188 Or. App. 526 (2003), review allowed, 336 Or. 376 (2004); League of Oregon Cities v. State of Oregon, 334 Or. 645 (2002); Lehman v. Bradbury, 333 Or. 231 (2002); Swett v. Bradbury, 333 Or. 597 (2002); Armatta.

**B. Applying Article XVII, Section 1.**

In Armatta, the Supreme Court set forth the analysis to be undertaken to determine whether a proposed initiative violates the single amendment/single vote requirement. The Court stated:

We conclude that the proper inquiry is to determine whether, if adopted, the proposal would make two or more changes to the Constitution that are substantive and are not closely related. If the proposal would effect two or more changes that are substantive and not closely related, the proposal violates the separate-vote requirement of Article XVII, section 1, because it would prevent the voters from expressing their opinions as to each proposed change separately. In some instances, it will be clear from the text of the proposed initiative whether it runs afoul of Article XVII, section 1. In other instances, it will be necessary to examine the implications of the proposal before determining whether it contains two or more amendments.

327 Or. at 277. Lincoln Interagency Narcotics Team, 188 Or. App. at 536-37 (quoting and applying that test); League of Oregon Cities, 334 Or. at 664 (same); Lehman, 333 Or. at 239 (same); Swett, 333 Or. at 601 (same).

In Armatta, the Court set up a three-step template for determining whether a proposed initiative violates the single amendment/single vote requirement. The first step is to determine the effect the proposed initiative has on other provisions of the constitution. 327 Or. at 277-8. If a proposed initiative amends more than one provision of the Oregon constitution, the next step is to determine whether those amendments are substantive. Id. at 283. If an initiative makes multiple, substantive changes to the Oregon constitution, then the final step is to determine

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whether those amendments are “closely related.” See also League of Oregon Cities, 334 Or. at 664-75 (applying that framework); Lehman, 333 Or. at 239-50 (same).

### 1. Step One: Multiple Amendments.

In determining whether an amendment “changes” the constitution, the focus is not on the form of the amendment itself, but rather on the effect its enactment would have on the Oregon Constitution. Armatta, 327 Or. at 263. For Article XVII, section 1 purposes, changes to the constitution can be either explicit or implicit. An explicit amendment occurs when the proposed initiative specifically provides that it amends a provision of the constitution. See Armatta, 327 Or. at 277-8 (discussing explicit amendments made to the Oregon constitution by an initiative petition). An implicit amendment occurs when the proposed initiative alters other provisions of the Oregon constitution, even though such amendments are not stated in the text of the proposed initiative. See id. at 282-3 (discussing implicit amendments made to the Oregon Constitution by an initiative petition). See also Lehman, 333 Or. at 243 (“we look not only at the explicit changes but also at the implicit changes that a measure would make to the constitution”); League of Oregon Cities, 334 Or. at 667 (looking at implicit changes made by proposed initiative). The addition of provisions to the Oregon constitution is considered a “change” or “amendment” for the purposes of an Article XVII, section 1 analysis. See Lincoln Interagency Narcotics Team, 188 Or. App. at 536 (“constitutional changes are not limited to amendments that expressly or implicitly repeal or modify existing constitutional provisions; additions to the constitution also can make substantive changes to it”).

### 2. Step Two: Substantive Amendments.

A change to the Constitution is “substantive” so long as it real, as opposed to speculative, and involves more than mere grammatical and housekeeping changes. See Armatta, 327 Or. at 283 (concluding that changes to Oregon Constitution are substantive).

### 3. Step Three: Closely Related.

In Armatta, the Court explained that multiple amendments are not closely related if they “bear[] no relation” to one another. 327 Or. at 283-4. In Lehman, the Supreme Court further clarified the Armatta test. The Court explained that “the separate vote requirement requires that proposed amendments to the constitution be submitted to the voters in a manner that permits the voters to express their will in one vote as to only one constitutional change.” Lehman, 333 Or. at 239 (citation omitted; internal quotation marks omitted). The Court further clarified that, when one initiative makes changes to separate provisions of the constitution that “are very different from one another,” the separate vote/separate amendment requirement in Article XVII, section 1 has been violated. Id. at 245. The Court explained:

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If the affected provisions of the existing constitution are themselves not related, then it is likely that changes to those provisions will offend the separate vote requirement. \* \* \* [T]he fact that a proposed amendment asks the people, in one vote, substantively to change multiple provisions of the Oregon Constitution that are not themselves related is one indication that the proposed amendment might violate the separate-vote requirement.

Id. at 245. See also League of Oregon Cities, 334 Or. at 674-75 (quoting and applying that passage from Lehman). Similarly, if the proposed amendments affect “separate constitutional rights, granted to different groups of people” they are not closely related. Armatta, 327 Or. at 284; Lincoln Interagency Narcotics Team, 288 Or. App. at 539.

### III. INITIATIVE PETITION 17 VIOLATES ARTICLE XVII, SECTION 1.

The proposed initiative petition makes multiple, substantive amendments to the Oregon constitution that are not closely related. Accordingly, the initiative violates the single amendment/single vote requirement of Article XVII, section 1.

Initiative Petition 17 would add new provisions to the Oregon constitution. In addition, the initiative would affect numerous existing provisions of the Oregon constitution.

#### A. Article I, Section 8.

Article I, section 8 of the Oregon constitution prohibits any law which restrains the right of citizens to speak or express an opinion. In Vannatta v. Keisling, 324 Or. 514, 931 P.2d 770 (1997), the Oregon Supreme Court held that campaign contributions are forms of expression protected under Article I, section 8. The initiative petition would place new burdens on one of the methods by which employees express their political opinions – the use of payroll deductions to make campaign contributions.

The proposed initiative would make a second modification of Article I, section 8. It is well-settled under Oregon law that the free speech provisions of the Oregon constitution grant separate and distinct rights than the free speech provision of the First Amendment to the Constitution of the United States. While subparagraph (g) of the proposed initiative provides that the initiative may not be construed to conflict with rights guaranteed by the United States constitution, it contains no similar provision regarding the Oregon constitution. In other words, the proposed initiative impliedly alters the guarantees of Article I, section 8.

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**B. Article I, Section 16.**

Article 1, section 16 of the Oregon Constitution prohibits the imposition of excessive fines. The initiative petition would require excessive fines in many circumstances. Subsection (d) of the petition would require a penalty of two times the amount of all money spent in violation of the proposal, plus return of double the employee's funds, plus attorneys' fees and costs. Subsection (a) provides that money is used for a political purpose if "any portion" of the employee payroll deduction is so used. When subsections (a) and (d) are read together, the initiative would lead to excessively harsh results. For example, if \$5 of political funds were commingled with the \$2 million treasury of a charity, the whole treasury would be tainted. The mandatory fine would be \$4 million, for a mere \$5 violation. (That is not including the \$10 that would be returned to the employee). Although the first subsection (f) makes a limited exception for first time violations, that does not cure the amendment the initiative would make to the excessive fines provision of the Oregon constitution.

**C. Article I, Section 26.**

Article I, section 26 prohibits laws which restrain Oregonians from peaceably assembling together for their common good. The initiative petition would restrain one of the ways in which groups of employees act collectively – through the payroll deduction systems to donate to political causes which further the common good of the group. Accordingly, the initiative would change the freedom of assembly provisions of the Oregon constitution.

**D. Article I, Section 21.**

Article I, section 21 prohibits any law that impairs the obligation of contracts. There are contracts currently in existence between employers and employees or their representatives which require certain payroll deductions, some of which are used for political purposes. The initiative would amend Article I, section 21 by impairing those existing contracts.

As the foregoing discussion shows, initiative 17 would amend numerous provisions of the Oregon constitution. Those amendments are not merely speculative. And those amendments clearly would be substantive; the amendments do not entail simply correcting typographical errors or renumbering paragraphs.

It is equally clear that these amendments are not "closely related." The amendments affect numerous unrelated provisions of the Oregon constitution ranging from free speech and assembly rights to contract rights to guarantees against excessive fines.

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Proposed initiative 17 does not comply with the single amendment/single vote requirement of Article XVII, section 1, of the Oregon constitution. Accordingly, no certified ballot title should be issued for the proposed initiative and your office should take no further action on the proposed initiative beyond notifying the public that the proposed initiative is constitutionally flawed.

**IV. INITIATIVE PETITION 17 VIOLATES THE FULL TEXT REQUIREMENT OF ARTICLE IV, SECTION 1(2)(d).**

Article IV, section 1(2)(d) of the Oregon constitution provides: "An initiative petition shall include the full text of the proposed law or amendment to the Constitution." In Kerr v. Bradbury, 193 Or. App. 304, 89 P.3d 1227 (2004), the Court of Appeals held that Article IV, section 1(2)(d) requires that, in any proposed initiative petition, the "full text of the [constitutional amendment appear] as it would appear if amended." 193 Or. App. at 325. In other words, the proposed amendment must set out not only its own text, but also the text of any constitutional provision that it amends. Id. at 325-26.

As was set forth above, the proposed initiative would amend numerous provisions of the Oregon constitution. However, the proposed initiative does not even mention the provisions affected, much less lay out those provisions. In the light of the Court of Appeals' binding opinion in Kerr, there is no question that the proposed initiative violates the full-text provision of the Oregon constitution. For that additional reason, proposed initiative 17 does not comply with Article IV, section 1(2)(d) of the Oregon constitution. Accordingly, no certified ballot title should be issued for the proposed initiative and your office should take no further action on the proposed initiative beyond notifying the public that the proposed initiative is constitutionally flawed.

Please feel free to contact me with any questions.

Very truly yours,

Steven C. Berman

SCB:ab  
cc: client

S M I T H  
D I A M O N D  
& O L N E Y  
ATTORNEYS AT LAW

Barbara J. Diamond  
Margaret S. Olney\*  
Monica A. Smith

\* Member Oregon and Washington Bars

January 27, 2005

VIA FACSIMILE (503) 373-7414  
AND REGULAR MAIL

John Lindback  
Director of Elections  
Office of the Secretary of State  
141 State Capitol  
Salem, Oregon 97310-0722

RECEIVED  
2005 JAN 27 PM 2:31  
SIL DIAMOND  
SECRETARY OF THE STATE

Re: Initiative Petition 17 (2006) – Draft Ballot Title Comments  
Our File No. 328

Dear Mr. Lindback:

This firm represents Kris Kain, an Oregon elector and President of the Oregon Education Association, and Chip Terhune, an Oregon elector and Assistant Executive Director for Public Affairs for the Oregon Education Association. We write in response to your News Release dated January 13, 2005 which invites comments to the draft ballot title for Initiative Petition 17 (2006).

1. INTRODUCTION

Initiative Petition 17 (2006) seeks to amend the constitution to restrict how a “person, company, or organization” receiving payroll deducted funds can use those funds. Section 1(a).<sup>1</sup> It prohibits the use of deducted funds for “political purposes” unless the individual, company or organization obtains advance written authorization for such use, “renewed annually, on a form used exclusively for that purpose.” Section 1(c). It also prohibits recipients from commingling “political funds” with other money. Section 1(e).

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<sup>1</sup> This initiative is almost identical to IP 15 (2006), on which Kain and Terhune have also submitted comments. The only difference is that this proposal applies to both public and private sector payroll deductions, while IP 15 (2006) only applies to the public sector.

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IP 17 (2006) then establishes penalties, all of which are borne by the individual, company or organization violating the measure. First, the violator must repay the employee for double the amount used for a political purpose, plus attorneys fees and costs. Second, the violator must pay a civil penalty equal to double the amount spent in violation of the act. Section 1(d). Finally, any individual, company or organization that spends or commingles money received from public employee payroll deductions in violation of the measure, will be permanently barred from receiving public employee payroll deducted funds for any reason whatsoever. Section 1(f).<sup>2</sup>

IP 17 (2006) is similar to IP 22 (2004), with one exception. IP 22 (2004) only restricted what *organizations* receiving payroll deducted funds can do with the money. This proposal limits what “a person, company, or organization” can do with the funds. This change appears to have been designed to obtain a different ballot title than that certified for IP 22 (2004) after the Oregon Supreme Court held that the true subject of the initiative was the impact on the organizations receiving the payroll deducted funds. *Nesbitt v. Myers*, 335 Or 219, 224, 64 P3d 1133 (2003). Unfortunately, the draft ballot title for IP 17 (2006) ignores the court’s direction and fails to adequately identify and focus on the true subject of the proposal.

We will discuss our concerns in more detail below.

## 2. CAPTION

The Attorney General proposed the following caption for IP 15 (2006):

Amends Constitution: Prohibits Using Any Employees’ Payroll Deductions for “Political Purposes” (Defined) Without Complying with Specified Requirements

The fundamental flaw with this proposal is that, like the caption found insufficient in *Nesbitt v. Myers, supra.*,<sup>3</sup> it obscures the true subject of the proposal:

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<sup>2</sup> Section 1(f) only appears to apply to deductions from a public payroll system. Given the scope of the proposal otherwise, this may well be a clerical error. Regardless, the ballot title must reflect what is contained in the actual text, not what we guess the Chief Petitioner intended.

<sup>3</sup> The rejected caption read: “Amends Constitution: Prohibits Collecting and Using Payroll Deductions for “political purposes” (defined) Without Employees’ Written, Annual Authorization.”

Mr. John Lindback – IP 17 (2006)

January 27, 2005

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to limit what any recipient of public employee payroll deducted money can do with that money. Presumably, this is because IP 17 (2006) expands the scope of the prohibition to individuals, companies and organizations that receive payroll deducted funds, thus creating word-space problems. However, the addition of individuals only makes it more critical that the caption accurately describe the proposal. This is because of prior public discourse and the unlikelihood that voters would even guess that the initiative regulates what individuals can do with payroll deducted money.

We propose the following:

**AMENDS CONSTITUTION: INDIVIDUALS, ORGANIZATIONS  
RECEIVING PAYROLL DEDUCTIONS CANNOT USE THEM FOR  
“POLITICAL PURPOSES” WITHOUT EMPLOYEE’S WRITTEN  
AUTHORIZATION**

This alternative closely tracks the language certified by the Oregon Supreme Court.<sup>4</sup> *Nesbitt v. Myers, supra*. We have deleted the word “(defined).” The fact that the proposal gives “political purposes” a particularized definition is already signaled by the use of quotation marks. We have also shortened the statutory terms, “person, company or organization” to “individuals, organizations.” “Individual” is preferable to “person” because the word is more precise and the plural reads more easily within the body of the ballot title. “Individual” also clearly communicates that the measure’s limitations apply not just to organizations (like unions, health insurance providers and financial institutions), but also to non-affiliated individuals (such as individuals receiving garnishments). We have proposed using “organization” because it is broadly understood to encompass both “companies” and “organizations.”<sup>5</sup> That is, companies are often referred to as “organizations.”

In sum, we strongly believe that under *Nesbitt v. Myers*, the caption must clearly focus on the entities whose conduct is being limited: organizations and individuals. The alternative proposed above does so and we urge that it be adopted.

3. **RESULT OF “YES” VOTE**

The draft “yes” result statement, like the draft caption, fails to accurately and simply tell voters what will happen if they vote “yes” on this proposal. Again, voters

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<sup>4</sup> The certified caption for IP 22 (2004) read: “Entities receiving payroll deductions cannot use them for “political purposes” (defined) without employee’s written authorization.”

<sup>5</sup> An alternative, but less commonly understood term would be “entity.”

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should understand that their “yes” vote operates to restrict how both individuals and organizations that receive payroll deducted funds may spend those funds. The draft caption attempts to capture this detail by using the term “anyone.” The problem is that this term sounds so informal and general that voters are left wondering, “who exactly is ‘anyone’?” This problem is solved by referring to “individuals, organizations.”

The “yes” vote result statement should also capture the prohibition on “commingling” non-political money with political money. We have done so by using the phrase, “if any portion.” This phrase was used throughout the ballot title for Measure 92 (2002).

Finally, where word space allows, the ballot title should talk about payroll deducted *funds*, and not just payroll deductions (as appears in the draft statement). This phrasing makes clearer that the proposal is concerned with the money received through payroll deduction and not the payroll deduction process itself.

We propose the following alternative:

**RESULT OF “YES” VOTE: “Yes” vote prohibits individuals, organizations from spending any portion of funds received through payroll deductions on “political purposes” without employee’s specific written authorization; other requirements.**

4. RESULT OF “NO” VOTE

Unlike the remainder of the ballot title, the draft “no” result statement tracks that certified for IP 22 (2004). Nonetheless, we believe that it should be modified to be more readable and to more clearly provide pertinent information to voters. Specifically, voters need to understand that under current law, individuals and organizations get to spend money that they receive through payroll deductions in exactly the same manner as other funds. The draft “no” vote result statement attempts to make this point, but it is diluted by the confusing reference to segregating funds. On this last point, neither the caption nor “yes” result statement expressly refer to the commingling prohibition. Thus, the reference to “segregating funds” comes out of the blue and is not readily understood. We also believe this is a “second tier” detail that is better addressed in the summary. Finally, it is inaccurate to say that recipients must segregate only those funds “earmarked” for political activities. Any money that is ever used for a political purpose must be segregated, whether or not it was collected or originally intended to be used, *i.e.* “earmarked” for a “political purpose.”

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In light of these comments, we propose the following:

**RESULT OF “NO” VOTE: “No” vote retains current law allowing individuals, organizations to spend funds received through payroll deductions in the same manner as funds received by other means.**

## 5. SUMMARY

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

The draft summary has a number of deficiencies. First, the description of current law -- while accurate -- is off point. Again, as discussed above, what the proposal does is restrict how organizations spend payroll deducted funds. Voters need to understand that under current law, money an employee pays by payroll deduction is not treated differently than other money, because that is what the proposal changes. If passed, individuals and organizations would not be able to use funds deducted from an employee’s paycheck for “political purposes” unless they obtained the employee’s advance written authorization, renewed annually on a specific form.

In addition, because the measure specifically limits organizations’ *political* use of payroll deducted funds and because unions’ political activities are treated differently than that of other organizations, voters should be told that unions cannot *require* political contributions. Notably, this information was included in the summary for IP 18 (2002) and Measure 92 (2000). *Sizemore v. Myers*, 328 Or 350, 976 P2d 1122 (1999). It should not be omitted from this summary.

The draft summary’s description of the measure’s operative provision is also insufficient. The proposal restricts how a “person, company or organization” can use payroll deducted funds. The draft refers to these three groups as “anyone.” As discussed above in section 3, that term is too imprecise to convey the actual scope of the proposal. The draft also fails to completely describe the written authorization requirement. It is essential that voters understand that the authorization must be on a form used *exclusively* for that purpose. The draft inexplicably leaves out the word “exclusively,” even though it is in the measure. It should not do so.

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The description of what constitutes "political purposes" is also confusing and incomplete. The draft summary includes a sentence summarizing the so-called lobbying exclusion from the definition of "political purposes." The problem is that this provision is designed to garner favorable language in the ballot title, but has no independent significance. The definition of "political purposes" is exclusive. The proposal lists that conduct which it considers political. Lobbying is not on the list. It is unnecessary to independently state that fact. In addition, the draft summary's description makes it sound like spending money on communications identifying candidates within 90 days of the election is necessarily a type of lobbying. It is not. Rather, this limitation is simply another type of prohibited political activity that should be included in the list defining "political purposes." Finally, the draft summary omits reference to activities encouraging or discouraging petition signature gathering.

Lastly, the summary must more clearly describe the extraordinarily severe penalties contained in the proposal. That is, an individual or organization that used public employee payroll deducted money in violation of this measure (by spending or commingling payroll deducted funds for impermissible "political purposes") is *permanently barred* from receiving any funds through public employee payroll deductions. That penalty was included in the summary of IP 23 (2004). It should be included here as well.

In light of these comments, we propose the following:

**Amends Constitution:** Under current law, individuals, organizations can spend funds received through payroll deductions the same as funds received by other means. Unions cannot require political contributions. Measure prohibits any "person, company or organization" receiving payroll-deducted funds from spending any portion of those funds for "political purposes" without employee's written authorization for such expenditures renewed annually on form used exclusively for that purpose. "Political purpose" includes: contributions to candidate, political committee, party; expenditures supporting, opposing ballot measure, candidate or petition signature gathering; communications identifying candidate within 90 days of election. Any money commingled with political funds is considered money used for a "political purpose." Misuse of public payroll-deducted funds permanently bars that entity from receiving any money through public payroll deductions. Other penalties and provisions.

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Commenter's alternative proposal is accurate and easy to understand. It describes the relevant current law and how the measure affects that law. In particular, it uses the language of the measure itself in describing what kind of authorization is necessary – i.e., "on a form used exclusively for that purpose."

This alternative also includes all concepts contained in the draft summary, except for the requirement that the legislature ensure the confidentiality of personal information. That is an implementing detail that does not go to the core provisions of the measure, and therefore must give way to more essential concepts.

In sum, we believe that the draft ballot title fails to adequately identify who is affected by the measure. Our alternative does so, and also explains how the measure works in simple and understandable language. We urge that it be adopted.

Thank you for your careful consideration of these comments. Please send a copy of the certified ballot title as soon as it is available.

Sincerely,

SMITH, DIAMOND & OLNEY

Margaret S. Olney

MSO/lck

cc: Chip Terhune  
Mark Toledo

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