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**Bill Sizemore** 2006 APR 12 PM 2:13  
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SARAH HADSBURY  
SECRETARY OF THE STATE

April 10, 2006

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

As an Oregon elector, I offer the following comments regarding the draft ballot title for initiative #10 for the 2008 general election.

For the following reasons, I do not believe the draft ballot title complies with the statutory requirements for a ballot title as set forth in ORS 250.035.

My first objection is to the failure of the draft caption to include the word "union". There is no way for voters to know automatically that the measure relates to the payment of union dues.

I also object to the use of the term "fair share", which is a union term of art and is neither unbiased nor part of the everyday voter's common vernacular. Saying that employees must pay their fair share is like calling those who don't "free riders", even if they want nothing to do with the union and desire no representation. It is union rhetoric and is out of place in a ballot title unless it is clearly and fairly defined.

As I observe in my comments regarding the draft summary, I do not object to the use of the term "fair share", where it is defined fairly and accurately.

I offer the following alternative caption, which seems to cover all the bases and is fair and accurate:

**EXEMPTS PUBLIC EMPLOYEES FROM PAYING FOR UNION  
REPRESENTATION UNTIL OPPORUNITY TO PARTICIPATE IN UNION  
ELECTION**

One change could be made to designate the type of election, if desired, so I offer the following second alternative:

**EXEMPTS PUBLIC EMPLOYEES FROM PAYING FOR UNION  
REPRESENTATION UNTIL OPPORUNITY TO PARTICIPATE IN UNIONISM  
ELECTION**

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TIMOTHY TRICKY  
SECRETARY OF THE STATE

I have no objections to the draft Yes vote statement. However, because it seems straightforward and accurate, I suspect the unions will have several objections.

Regarding the draft No vote statement, I do not see its relevance to the measure. This measure is not about whether members and nonmembers pay dues or "fair share". Describing a No vote as retaining a law that will be retained by a Yes vote as well could lead voters to assume that a Yes vote would repeal this existing law.

I suggest the following alternative No vote statement, which describes current law as it is relevant to this measure:

**"No" vote retains law allowing unions to require payment of dues or "fair share" equivalent, regardless of employee opportunity to vote in union representation election.**

I have no objections to the draft summary. I believe it to be a fair and accurate description of current law and the effect of this measure, should it pass.

Thank you for considering my comments.

Sincerely,

Bill Sizemore

**S M I T H**  
**DIAMOND**  
**& OLNEY**  
 ATTORNEYS AT LAW

Barbara J. Diamond  
 Margaret S. Olney\*  
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\* Member Oregon and Washington Bars

April 12, 2006

VIA FACSIMILE (503) 373-7414  
 AND REGULAR MAIL

The Honorable Bill Bradbury  
 Secretary of State  
 141 State Capitol  
 Salem, Oregon 97310-0722

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 BILL BRADBURY  
 SECRETARY OF THE STATE

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*OK*

Re: Initiative Petition 10 (2008) – Draft Ballot Title Comments  
 Our File No. 328

Dear Secretary Bradbury:

This firm represents Larry Wolf, 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 March 29, 2006 which invites comments to the draft ballot title for Initiative Petition 10 (2008).

1. INTRODUCTION

Initiative Petition 10 (2008) is a statutory proposal filed by Bill Sizemore and Tim Trickey. It seeks to substantially change Oregon labor laws to dilute – if not destroy – the ability of public sector unions to represent the interests of public employees. It does so by effectively eliminating the ability of public sector unions to collect dues or “fair share” fees from any employee who has not had the opportunity to vote in a “representation election.” At the same time, it leaves intact the union’s duty to represent all employees in the bargaining unit, including all employees joining the workplace after the last union election. What this means is that employees are not required to contribute to the costs of union representation, even though the union has the duty to represent those employees as the recognized bargaining agent. This is the subject of the proposal. Unfortunately, as discussed below, the draft

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ballot title utterly fails to capture this subject, instead simply parroting the words of the measure itself.

2. CAPTION

ORS 250.035(2)(a) provides that a ballot title contain “[a] caption of not more than 15 words that reasonably identifies the subject matter of the state measure.” The caption is the “cornerstone for the other portions of the ballot title” and in order to comply with the statute, it must identify the proposal’s subject matter in terms that will not “confuse or mislead potential petition signers and voters.” *Mabon v. Myers*, 332 Or 633, 33 P3d 988, 332 Or 633 (2001) (citations omitted). In determining the subject of the proposal, the court looks to the text of the measure and the legal context in which it is proposed. *Dale v. Kulongoski*, 321 Or 108, 112, 894 P2d 462 (1995). The court has also made clear that proponents of a measure are not entitled to “engineer a favorable ballot title by incorporating politically inflated terms or phrases in the text of the measure in order to advance its passage.” *Earls v. Myers*, 330 Or 171, 176, 999 P2d 1134 (2000). *Cf. Bernard v. Keisling*, 317 Or. 591, 596-97, 858 P.2d 1309 (1993) (court will not hesitate to look beyond words of measure if those words obfuscate subject, chief purpose, summary, or major effect of measure).

Here, the Attorney General proposed the following caption:

EXEMPTS PUBLIC EMPLOYEE WHO COULD NOT  
VOTE IN REPRESENTATION ELECTION FROM  
PAYING DUES, “FAIR SHARE”

This caption uses the language of the measure itself, without any effort to identify what the proposal actually *does*. The result is a caption that is misleading and biased, and that fails to identify the true subject of the proposal, in violation of ORS 250.035(2). There are a number of problems. First, the use of the term “exempt” is misleading because it implies that without the exemption, public employees are legally required to pay dues or fees-in-lieu-of-dues. That is not the case. Current law does not require public employees to pay dues or “fair share” fees. It simply authorizes a public employee union and employer to enter into a collective bargaining agreement that requires all bargaining unit members – those employees for whom the union owes a duty of representation – to pay dues (as a union member), or fees-in-lieu-of-dues (as a non-member). Not all collective bargaining agreements include “fair share” provisions, making it misleading to use the word “excmpts.”

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The second problem is with the phrase “could not vote in a representation election.” It makes it sound like the union or another entity can somehow *prevent* an employee from voting in an election. Of course, that is not true, nor is it what IP 10 proposes. The proposed initiative simply says that employees who did not have the “opportunity” to vote in a representation election cannot be required to pay dues or fair share payments. Whether or not an employee has the “opportunity” to vote in an election is governed by the Public Employees Collective Bargaining Act or “PECBA”), ORS 243.650 *et. seq.* That law allows public employees in Oregon to choose union representation through an election system that is run by the state Employment Relations Board. Once the employees choose union representation, that representation continues until the employees decide that they want to have an election to change their union representative or to get rid of (“decertify”) their union. The choice of whether to seek an election during an open period lies in the hands of the affected employees: any petition seeking a representation or decertification election must be supported by a “showing of interest” of at least 30% of the affected employees. *See*, OAR 115-25-000. Absent a showing of interest to support a petition for an election, employees cannot be forced to undergo an election. However, if there is sufficient showing of interest for an election, then all current employees within the bargaining unit get to vote. In short, the phrase, “could not vote in a representation election” is misleading and must be changed.

The third problem is the caption’s exclusive focus on “paying dues, ‘fair share.’” It is misleading and inaccurate to talk about union dues or “fair share” payments without referencing the union’s duty to represent *all* employees in the bargaining unit. This duty, known as the union’s “duty of fair representation,” exists independently of union membership or the collective bargaining agreement. *Vaca v. Sipes*, 396 US 171, 64 LRRM 2369 (1967); *Airline Pilots v. O’Neill*, 499 US 65, 136 LRRM 2721 (1991); ORS 243.672 (2)(a); *Putvinskis v. SWOCC Classified Federation, AFT and SWOCC*, 18 PECBR 882, 894 (2000). It also exists independently of any desire by a bargaining unit member to receive it. In other words, an employee cannot “opt out” of union representation.

To balance the union’s duty to represent all bargaining unit employees, both federal and state labor laws allow unions to negotiate agreements in collective bargaining agreements requiring all covered employees to pay their fair share of representation costs.<sup>1</sup> The U.S. Supreme Court described the rationale behind union security:

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<sup>1</sup> In the public sector, these provisions are known as “fair share” agreements. ORS 243.666. In the private sector, they are generally referred to as “union security” agreements. *See* Hardin, *The Developing Labor Law*, 3<sup>rd</sup> Ed. (1992), Chapter 26 and cases cited therein.

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The designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. \* \* \* Moreover, in carrying out these duties, the union is obliged “fairly and equitably to represent all employees, . . . union and non-union,” within the relevant unit. *A union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become “free riders” – to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees.*

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

What IP 10 seeks to do is upset the delicate balance established by state labor laws. Under the guise of employee “free choice” it allows employees to become “free riders.” That is the true subject of the measure, and must be explicitly described in the caption.

Notably, the Oregon Supreme Court has been called upon repeatedly to review ballot titles for Sizemore initiatives seeking to make Oregon into a *de facto* “right to work” state. Most recently, in *Novick/Bosak v. Myers*, 333 Or 18, 36 P3d 464 (2002), the court held that the ballot title for Initiative Petition 39 (2002) (providing that “no employee could be required to accept or pay for representation or any other service provided by a union or employee association”) must tell voters that the proposal would allow employees to receive union representation at no cost. The court explained, “[i]n practical terms, a prohibition on such [union security] agreements enables those employees to receive union representation without cost and represents a significant change in Oregon law.” *Id.* at 26. Therefore, it was one of subjects that must be identified in the caption.<sup>2</sup> *See also, Dale v. Kulongoski*, 321 Or 108, 115, 894 P2d 462 (1995), (certifying statement that the proposal “bans requiring nonunion public employees to share union representation costs; union must

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<sup>2</sup> Ultimately, after the modified ballot title was appealed, *Novick/Bosak v. Myers*, 333 Or 490, 41 P3d 1080 (2002), the court certified the following caption: “Allows Employees to Receive Union Representation Services Without Payment; Declares Individual Right to “Bargain” Directly.”

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represent such employees without charge.”); IP 45 (2002) (certified caption reads: “allows workplace employees represented by recognized union to refuse to pay for union representation “services”); IP 50 (2002) (certified caption reads: “Employees represented by union may refuse payment for representation; other changes to public-sector bargaining).

The same analysis applies here. IP 10 undisputably allows employees to receive union representation services without sharing to the costs of those services. Under *Novick* and *Dale*, the caption must plainly identify that subject.

To correct these problems, we propose the following:

**PUBLIC EMPLOYEE HIRED AFTER UNION'S  
ELECTION MAY REFUSE TO SHARE  
REPRESENTATION COSTS UNTIL NEW  
ELECTION.**

This alternative correctly focuses the voters on the subject of the measure – to allow employees to not share representation costs, simply because they joined the workplace after the union had been elected.<sup>3</sup> It uses a formulation approved in prior ballot title challenges (“refuse to share representation costs”). See e.g. caption for IP 45 (2002). We urge that it be adopted.

3. **RESULT OF “YES” VOTE**

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

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<sup>3</sup> To the extent that the term “hire” is believed to suggest only new “hires” by the public employee, as opposed to new “hires” within a specific workplace (e.g. bargaining unit), we propose the following alternative, which tracks previously approved captions.

**ALLOWS CERTAIN PUBLIC EMPLOYEES TO RECEIVE UNION  
REPRESENTATION SERVICES WITHOUT PAYMENT UNTIL  
NEXT REPRESENTATION ELECTION**

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Here, the Attorney General proposed the following “yes” vote result statement:

**RESULT OF “YES” VOTE: “Yes” vote exempts public employee who lacked opportunity to vote in election resulting in union representation from paying dues or “fair share” equivalent of dues.**

This 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 must be told that the proposal allows employees to receive union representation services without contributing towards the cost of that representation. Similarly, voters need to have a practical understanding of the election process and timing. Who exactly will be affected by this proposal? When can they be required to contribute towards the costs of representation? The following alternative places the representation election issue in context. We urge that it be adopted.

**RESULT OF “YES” VOTE: “Yes” vote allows public employees joining workplace after union election to refuse to share costs of representation until new election; union must represent all employees.**

#### 4. RESULT OF “NO” VOTE

ORS 250.035(2)(c) requires that the ballot title contain “simple and understandable statement” 25 words long, explaining what will happen if they reject the measure. This means that the statement must explain to voters “the state of affairs” that will exist if the initiative is rejected, that is, the *status quo*. It is also essential that the law described in the “no” vote result statement concern the subject matter of the proposal. Otherwise, the description could mislead voters about the effect of their vote. *Nesbitt v. Myers*, 335 Or 219, 223, 64 P3d 1133 (2003). *See also Nesbitt v. Myers*, 335 Or 424, 431, 71 P3d 530 (2003) (review of modified ballot title).

The draft “no” statement fails to accurately or adequately describe the relevant law. It fails to clearly tell voters that current law allows all employees who join a workplace represented by a union, to share in the costs of that representation.

We propose the following:

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**RESULT OF “NO” VOTE: “No” vote retains current law: all public employees represented by union may be required to share representation costs, regardless of when employee joined workplace.**

This alternative does not include the detail about how employees can be required to contribute towards the costs of representation, *i.e.*, through a collective bargaining agreement. That detail is not necessary for voters to understand the key fact – that under current law, a public employee *may be* required to contribute towards representation costs. Instead, this alternative gives additional information about how current law treats new hires – the group that would be allowed to be free riders under IP 10.

## 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 ballot title falls far short of this standard. First, the description of current law is both unclear and incomplete. Because the proposal seeks to alter the delicate balance between employee free choice and group collective bargaining rights, voters need to understand the basic provisions of that labor law. This includes: (1) how a union is elected (through majority vote); (2) the union’s obligations towards employees it represents (the duty of fair representation); (3) the union’s ability to negotiate contracts requiring all employees to contribute toward the costs of that legally-mandated representation; and (4) the timing of new representation elections (when thirty percent of current affected employees request an election). While the draft summary touches on some of these topics, the description uses terms of art that will have little meaning to voters (such as “fair share”, “collective bargaining,” “exclusive representative”). It is also incomplete. For example, there is no mention of the process for having a new election, even though that is a prerequisite before any employees can be required to share representation costs.

The second problem is that the summary, like the rest of the ballot title, no where plainly spells out the “free rider” problem. That is, it no where tells voters that this proposal allows employees to receive union representation services without

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contributing a dime for those services. Rather, it refers repeatedly to “dues” and “fair share” payments, without explaining the basis for requiring such payments. Again, this is the essence of the proposal. It must be plainly described.

Finally, the draft summary does not clearly tell voters that, because union representation elections are not scheduled, the effect of the proposal is to allow employees who join a workplace where employees had already elected a union, to receive union representation services without payment for an indefinite period. That is the major effect of the measure and must be included in the summary.

In light of these comments, we propose the following:

**SUMMARY: Under current law, when majority of public employees in workplace select union as collective bargaining representative, that union must fairly represent all employees, regardless of union membership; union may negotiate contract requiring all employees to share costs of representation services, including non-union members and employees joining workplace after union election. Union representation continues without new election, unless thirty percent of current affected employees request election. Under measure, public employees can refuse to contribute towards costs of union representation services unless and until they have an opportunity to vote in representation election. Effect is to allow public employees joining workplace where employees previously elected union to receive union representation services without payment indefinitely, unless there is sufficient interest by other employees for new election. Other provisions.**

This alternative uses the description of current law approved by the Supreme Court for IP #45 (2002) and #50 (2002). With regard to the election process, it uses language from the summary certified for IP 16 (2006). Word space for these additional concepts is found through editorial changes. The only detail that is omitted from this alternative is the lengthy description of “fair share.” However, the label is irrelevant. What is important is that voters understand that current law

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allows agreements requiring *all* employees to contribute towards the costs of representation. Our alternative does so. 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: Clients

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