UFCW LOCAL 555
Dan Clay, President Sandy Humphrey, Secretary-Treasurer

April 20, 2023

Representative Julie Fahey
Oregon State Capitol
Salem, OR 97301

**Re: Response to Holvey Memo dated April 13, 2023**

To Representative Fahey,

Representative Holvey recently posed three questions to Legislative Counsel with regard to HB 3183, to which Legislative Counsel responded by outlining several concerns, in a memo dated April 13, 2023.

Each of the questions had been considered and deliberated with outside counsel prior to the 2023 Legislative Session, and had we been aware of these concerns earlier we would have been pleased to share our conclusions at that time.

A summary of UFCW 555's responses to Representative Holvey's questions and Legislative Counsel's responses is as follows:

1. **First and most significantly, Legislative Counsel suggests that the entirety of HB 3183 would "most likely be preempted under preemption principles outlined in *San Diego Bldg & Constr. Trades Council v. Garmon,*" as well as relying heavily on *International Association of Machinists v. Wisconsin Employment Relations Commission*.**

   While Legislative Counsel rightly considers the possibilities of preemption under *Garmon* or *Machinists*, HB 3183 is carefully crafted so as not to intrude on federal power as outlined in the *Garmon* and *Machinists* line of cases.

   For example, Legislative Counsel claims that *Garmon* preempts HB 3183, stating that "The requirement that an applicant enter into a labor peace agreement with a bona fide labor organization that is 'attempting to represent the applicant's employees' arguably interferes with the rights of employees to select a representative of their own choosing." This is a misunderstanding of labor agreements. Were HB 3183 purporting to require an applicant to sign a *voluntary recognition* agreement with a labor organization attempting

to represent the applicant's employees, then the provision would likely run afoul of the rights of employees to select a representative of their own choosing. But a labor peace agreement is not the same thing as a voluntary recognition agreement. While a voluntary recognition agreement establishes a union as the recognized and exclusive representative of an employer's employees, a labor peace agreement merely provides a stable environment for the open competition of unions for majority support and recognition/certification. To be clear, a labor peace agreement does not establish the employer's recognition of a single union in any way.

Similarly, Legislative Counsel misapplies *Garmon* when it states, "By conditioning cannabis-related licensure and renewal upon an applicant's attesting to remain neutral regarding labor organization communication with the applicant's employees, we believe that HB 3183 and the -3 amendments to HB 3183 also infringe on an employer's ability to express noncoercive views regarding union organization." Nothing in the text of this provision of HB 3183 and the -3 amendments infringes on an employer's right to engage in lawful, noncoercive speech that does not interfere with employee's rights to engage in protected concerted activity under the National Labor Relations Act (NLRA). In addition, the bill importantly does not define "neutral" but leaves it up to the parties to negotiate the meaning of the term in arriving at the mutual terms of their labor peace agreement. In short, the bill itself does not put any additional restrictions on an employer's speech beyond what federal labor law already provides or what the employer is willing to negotiate for themselves with a labor organization.

The *Machinists* case is a bit different because it involved the State's attempt to curtail activity that was neither prohibited nor provided for in the NLRA (concerted efforts to refuse overtime work), and therefore it appeared that federal law was silent on the issue. However, the Court asserted that in some cases such as this, "Congress meant to leave some activities unregulated and to be controlled by the free play of economic forces," and that the clear intentions of the NLRA to allow parties to resort to "self-help" means would be stymied if the state decision stood:

> "There is simply no question that the Act's processes would be frustrated in the instant case were the State's ruling permitted to stand." (Emphasis added)

In their response to Rep. Holvey, Legislative Counsel is correct in stating that *Machinists* preempts activity that "Congress left 'to be controlled by the free play of economic forces'".

But *Machinists* preemption is also a highly nuanced doctrine that usually comes into play during judicial review of specific instances of state enforcement of a regulation. In HB 3183, the legislature has chosen a statutory scheme that reflects the least intrusive means of enforcement in light of the state's interest in ensuring a stable labor-management environment across the cannabis industry. Moreover, while numerous states have passed cannabis legislation with similar or the exact language of HB 3183, federal courts have thus far declined to apply *Machinists* preemption to such

legislation, reflecting federal deference to states' heightened regulatory interest in the industry.

Similarly, labor peace agreements as a condition of certification have long been used by various states in the casino and hospitality industries. These industries, like the cannabis industry, "touch[] interests so deeply rooted in local feeling and responsibility," *Garmon*, 359 U.S. at 244, and are areas of such concentrated state regulation, that it makes sense to infer that Congress did not intend to preempt the state's action.

2. **Secondly, Representative Holvey asks Legislative Counsel whether the fact that cannabis is a federally-illegal substance somehow preempts the State of Oregon from regulating it.**

   The principles regarding the interaction of federal government's cannabis laws with the State of Oregon's laws has been discussed at length since Oregon voters approved Measure 91, and the prevailing school of thought is that the Oregon Legislature may in fact regulate the cannabis industry.

   While we disagree with Legislative Counsel's analysis with regard to federal preemption, we agree with their assertion in answer number 2 that the question of federal legality of the product itself is immaterial.

3. **Lastly, Representative Holvey asks whether the State of Oregon may "dictate terms" among business and labor interests without a "proprietary interest" in the industry, and Legislative Counsel relies heavily on *Johnson v Rancho Santiago Community College District* to reassert their belief that the State is in fact preempted.**

   There are several problems with this line of reasoning (and it is worth keeping in mind that the court in *Johnson* ultimately dismissed the preemption challenge!).

   First, Legislative Counsel rightly lays out the District Court's test in *Johnson* to determine whether a State's actions are protected:

   > ""a two-prong test which asks first whether "the challenged governmental action [is] undertaken in pursuit of 'efficient procurement of needed good and services,' as one might expect of a private business in the same situation," and second, whether "the narrow scope of the challenged action defeat[s] an inference that its primary goal was to encourage a general policy rather than [to] address a specific proprietary problem.""

   But the wording seems to imply that both prongs of the test need to be fulfilled. Such an interpretation would be objectively incorrect given that the actual ruling in *Johnson* clarified that only one prong be fulfilled as well as provided an alternative test that is more applicable to HB 3183:

> "we … accordingly hold that a state action need only satisfy one of the two *Cardinal Towing* prongs to qualify as market participation not subject to preemption. …
>
> The Cardinal Towing test thus offers two alternative ways to show that a state action constitutes non-regulatory market participation: (1) a state can affirmatively show that its action is proprietary by showing that the challenged conduct reflects its interest in efficiently procuring goods or services, or (2) it can prove a negative — that the action is not regulatory — by pointing to the narrow scope of the challenged action. We see no reason to require a state to show both that its action is proprietary and that the action is not regulatory." (Emphasis added)

In the case of HB 3183, the State of Oregon is not likely to engage in sufficient retail activity to justify the initial procurement test, but the narrow scope of HB 3183 and its addressing of specific deficiencies in the State's workforce regulatory schema would satisfy either of the "alternative" prongs offered in *Johnson* (though only one is required) and attach the market participant immunity described.

In addition, Legislative Counsel cites *Johnson* for the proposition that "states may impose requirements of labor peace agreements on private enterprises only when the state is acting as a 'market participant' and has an economic or proprietary interest in the business." This is not entirely accurate. The "market participant" theory confers immunity from preemption, but its absence does not necessarily confer preemption. In other words, if a court determines that a state is not a market participant, then the court must still analyze the state's schema under preemption doctrines to determine if the state action is actually preempted. That a state is not a market participant does not automatically mean that its actions are preempted.

Whether the State is acting as a market participant in this case is ultimately irrelevant, since, as described above, we do not believe HB 3183 is preempted.

Rather, this is akin to ORS Chapter 806, which requires that an individual enter into a contract with an auto insurance provider in order to purchase a vehicle from a dealer. In no manner is the State a market participant in that transaction, but because there is no question of any federal preemption the State need not show such participation. Similarly, laws requiring employers to enter into contracts with a Workers Compensation Insurance provider are not preempted by federal law and thus the State need not be a market participant in such a transaction. (And while the State of Oregon is sometimes a participant in those relationships via SAIF, there are many states who have no such public option).

Additionally, we all should be familiar with this kind of regulatory affectation, given the passage of House Bill 4059 in the 2022 Session, which imposed various labor standards on certain renewable energy projects without any requirement that the State act as a market participant. (We are not aware of any similarly pointed inquiries made with regard to HB 4059.)

In sum, preemption is a matter of judicial determination — not legislative — and as such there is no way that anyone can say with certainty that a proposed policy will be preempted without an adjudication process. The State Legislature, then, need not bind itself on the premise of an unknowable future judicial determination.

Lastly, and perhaps most fundamentally, Legislative Counsel asserts that "it's reasonable to expect that the [National Labor Relations] board will assert jurisdiction and bring such employers and employees within the scope of coverage of the NLRA." However, nearly identical (and in some cases much more stringent) versions of HB 3183 have been in place in a number of states for several years, particularly California, New York, and New Jersey, and the NLRB has not taken any steps to assert this authority, nor have there been any substantive challenges to such laws.

We look forward to continuing to move HB 3183 through the legislative process.

Thank you,

Andrew Toney-Noland
Of Attorneys for United Food and Commercial Workers Local 555

Cc: Rep. Ben Bowman, Chief Sponsor
Rep. Dacia Grayber, Chief Sponsor
Senator Chris Gorsek, Chief Sponsor