IN THE COURT OF APPEALS OF THE STATE OF OREGON

ANDREA R. MEYER and DAVID FIDANQUE,

Plaintiffs-Appellants,

v.

BILL BRADBURY, Secretary of State for the State of Oregon,

Defendant-Respondent,

and

DAVID DELK,

Defendant-Intervenor-Respondent.

Marion County Circuit Court No. 04C-20669

Court of Appeals
No. A127935

BRIEF OF DEFENDANT-INTERVENOR-RESPONDENT DAVID DELK

Appeal from the Judgment of the Circuit Court
for Marion County

Honorable Claudia M. Burton, Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS, STATUTES, AND RULES

MISCELLANEOUS

I. STATEMENT OF THE CASE.

Defendant-Intervenor-Respondent David Delk [hereinafter "Intervenor" or "Delk"], chief petitioner for Initiative Petition 8 ["IP 8"], accepts Plaintiffs' statement of the case, except as noted below.[1]

A. NATURE OF THE ACTION.

Delk also raised issues pertaining to the standing of Plaintiffs to bring the claims in court, the justiciability of the claims, and Plaintiffs' failure to exhaust their administrative remedies. Although the decision of the trial court did not address these issues, they remain dispositive on this appeal. ***State Farm Fire v. Sevier***, 272 Or 278, 298, 537 P2d 88 (1975).

B. QUESTIONS PRESENTED ON APPEAL.

1. Are Plaintiffs' claims in court precluded by their failure to exhaust their administrative remedies for such claims?

2. Are Plaintiffs' claims precluded by their lack of standing in court to bring those claims.

3. Do Plaintiffs' claims present a justiciable controversy, in light of the alleged harm to Plaintiffs from certification of IP 8 for circulation.

4. Does IP 8 violate the "separate vote" requirement of the Oregon Constitution?

C. SUMMARY OF ARGUMENT.

Delk adopts and incorporates by reference all of the arguments that will be presented in the brief of Defendant-Appellee Bill Bradbury, the Oregon Secretary of State. In addition, Delk argues:

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1. There are now three chief petitioners. Joining David E. Delk are Jim Robison and Ruth Duemler.

1. Plaintiffs failed to exhaust their administrative remedies, because they never presented to the Secretary of State their claim that IP 8 amends Article IV, Section 25(1), of the Oregon Constitution, which is the only claim they present on appeal.

2. Plaintiffs failed to show facts sufficient to confer standing or justiciability.

3. IP 8 does not in any way violate the "separate vote" requirement of the Oregon Constitution.

D. STATEMENT OF FACTS.

The facts offered by Plaintiffs are supplemented, where necessary, in the substantive argument in this brief.

II. PLAINTIFFS CANNOT RAISE THEIR CLAIM THAT IP 8 AMENDS ARTICLE IV, SECTION 25(1), OF THE OREGON CONSTITUTION, BECAUSE THEY FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES ON THAT CLAIM.

Plaintiffs' only claim actually litigated in the trial court and presented to this Court is that IP 8 (2006) would amend both Article I, Section 8 and Article IV, Section 25(1), and thus constitutes more than one unrelated amendment to the Oregon Constitution. But plaintiffs did not present that claim in the mandatory agency proceeding underlying their challenge to IP 8 in the Circuit Court. Thus, they failed to either use or exhaust their administrative remedies on their only claim.

A. PRESERVATION OF ISSUE.

The fact that the trial court did not reach this issue was not an "error"; it was simply not necessary, in light of the trial court's resolution of all substantive issues raised by Plaintiffs. Nevertheless, the failure to exhaust administrative remedies argument was fully presented to the trial court in the following 5 documents:

> Answer and Affirmative Defenses of Intervenor (December 20, 2004)
>
> Intervenor Delk's Motion for Summary Judgment on All Issues and Supporting Memorandum (December 23, 2004)
>
> Intervenor Delk's Reply Memorandum Supporting Summary Judgment for Defendant and/or Defendant-Intervenor (January 13, 2005)
>
> Intervenor Delk's Reply Memorandum Supporting his Motion to Intervene (January 13, 2005)
>
> Intervenor Delk's Reply to Plaintiffs' Response to Intervenor's Summary Judgment Motion (February 7, 2005)

The letter opinion and subsequent judgment entered by the trial court did not address this issue. Nevertheless, its validity would require judgment against plaintiffs, and it is fully cognizable in this appeal.

B. STANDARD OF REVIEW FOR AFFIRMING TRIAL COURT DECISION ON ALTERNATIVE GROUNDS.

A reviewing court may uphold a trial court's decision on grounds different from those relied on at trial if, on *de novo* review, the appellate court finds necessary facts to support alternative grounds. ***Progressive Specialty Ins. Co. v. Carter***, 126 Or App 236, 241, 868 P2d 32, 35 (1994):

> Although the trial court did not rule on that issue, we may uphold the trial court's decision on grounds different from those it relied on if, on de novo review, we find the necessary facts to support the alternative grounds.

Accord, ***State Farm Fire v. Sevier***, 272 Or 278, 298, 537 P2d 88 (1975):

> We are reluctant to reverse a trial court on grounds or theories other than those on which a case is tried and decided * * *. The considerations are different in cases in which we affirm a trial court. In such cases, when the trial court arrived at a correct result, but on grounds different than those which, in our opinion, are more proper as the basis for such a result, we believe that it is not improper to affirm the trial court; provided, of course, that the pleadings are sufficiently broad and there is sufficient evidence in the record, as in this case.

Here, the grounds we argue were fully presented to the trial court but were not reached by the trial court.

C. ARGUMENT.

Plaintiffs are Andrea R. Meyer and David Fidanque. They participated in the proceeding conducted by the Secretary of State on whether IP 8 complies with all procedural constitutional requirements by filing written comments to the Secretary of State on September 10, 2004. They contended that IP 8 would amend both Article I, section 8, and Article IV, Section 1. **They made no mention whatever of Article IV, Section 25(1), which then formed the entire basis of their case before the Circuit Court and now in this Court.** Thus, they deprived the Secretary of State, as advised by the Attorney General, of making a determination on whether IP 8 amends both Article I, Section 8 and Article IV, Section 25(1).

Oregon law is clear that a party may not go directly to court with a claim, thereby bypassing agency proceedings, if that claim was cognizable in an administrative proceeding but was not raised there. Here, all of plaintiffs' claims regarding IP 8 were fully cognizable in a proceeding conducted by the Secretary of State, who on August 27, 2004, issued a request for comments:

> In addition, during this ballot title comment period, the Secretary of State will also seek statements from interested persons regarding whether or not a proposed initiative petition complies with procedural constitutional requirements for submission of proposed initiative petitions. The Secretary will consider the information provided in the statements received from interested persons. If you wish to comment, this period ends September 10, 2004.

Secretary of State, News Release, August 27, 2004 [Amended Complaint, Ex. 2].[2] If

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2. The entire document is available at:

(continued...)

the Secretary of State determines that the proposed measure does not meet the procedural constitutional requirements, the Secretary of State then refuses to certify a ballot title, thus precluding the collection of signatures.

Ayres v. Board of Parole and Post-prison Supervision, 194 Or App 429, 435, 97 P3d 1 (2004), summarized the law in Oregon requiring that a party exhaust administrative remedies before coming to court, noting

> the "general rule of administrative law" that, as to matters within the administrative agency's jurisdiction, "[j]udicial review is only available after the procedure for relief within the administrative body itself has been followed without success." *Mullenaux v. Dept. of Revenue,* 293 Or 536, 539, 651 P2d 724 (1982) (internal quotation omitted). Traditionally, the exhaustion doctrine has imposed several requirements on an aggrieved party. First and foremost, a party seeking judicial review of agency action may not bypass available administrative remedies in favor of immediate access to the courts. *Ebert v. Dept. of Rev.,* 307 Or 649, 652-53, 771 P2d 1018 (1989); *Mullenaux,* 293 Or at 540, 651 P2d 724. Nor may the party merely "step[ ] through the motions of the administrative process without affording the agency an opportunity to rule on the substance of the dispute." *Mullenaux,* 293 Or at 541, 651 P2d 724. Instead, the party must present the particular challenges it intends to raise on judicial review first to the administrative body whose review must be exhausted. *Id.; Outdoor Media Dimensions Inc. v. State of Oregon,* 331 Or 634, 661-62, 20 P3d 180 (2001).

As noted in ***Ayres***, *supra*, the party in court must have first:

1. "afford[ed] the agency an opportunity to rule on the substance of the dispute." *Mullenaux,* 293 Or at 541, 651 P2d 724; and

2. "must present the particular challenges it intends to raise on judicial review first to the administrative body whose review must be exhausted. *Id.; Outdoor Media Dimensions Inc. v. State of Oregon,* 331 Or 634, 661-62, 20 P3d 180 (2001).

2.(...continued)
http://www.sos.state.or.us/elections/irr/2006/008dbt.pdf

At the trial court, Intervenor requested judicial notice of this document, pursuant to Rule 201(b), Oregon Rules of Evidence, ORS 40.065. No one objected.

At the agency, plaintiffs presented only two particular challenges regarding IP 8 to the Secretary of State:

(1) Their contention that IP 8 runs afoul of Article XVII because it amends Article I, section 8, and Article IV, Section 1;

2) Their contention that IP 8 violates the guarantee of a republican form of government contained in the US Constitution, Article IV, section 4.

Their comments to the Secretary of State refer to no other sections of the Oregon Constitution allegedly amended by IP 8. Thus, they are precluded from raising in court the new contention that it also amended Article IV, section 25(1), which now forms the entire basis of their appeal in this Court.

Here, Plaintiffs now claim that IP 8 violates the one-amendment requirement, solely because it allegedly amends both Article I, section 8 and Article IV, Section 25(1). That contention was never presented to the Secretary of State. Thus, under ***Ayres***, they are precluded from raising in court this entirely new contention. Plaintiffs in this court are not pursuing any of the claims they presented to the Secretary of State, and the only claim they are pursuing was never presented to the Secretary of State. It is hard to imagine a clearer case of failure to exhaust administrative remedies, which requires remand with instructions to dismiss Plaintiffs' claims.

As Delk can file only one brief in this Court, he must anticipate the arguments that Plaintiffs may offer in their reply brief. Plaintiffs argued below that they brought this case under ORS 246.910(1) (as well as under the Administrative Procedures Act, ORS 183.484(1), and the Declaratory Judgment Act, ORS 28.010, and the Supreme Court has expressly stated that a person's status as voter is sufficient to confer standing to bring an action under that statute. This analysis in no way defeats the exhaustion requirement in this case. **All of the cases plaintiffs cited below were**

post-election challenges to enacted ballot measures, for which there existed no administrative proceeding to address the issues raised by plaintiffs. Thus, in those cases there existed no administrative remedies to exhaust. This case, however, is a pre-election challenge for which there is a specific administrative proceeding before the Secretary of State.

Plaintiffs below cited ***Ellis***, ***Lowe***, ***Armatta***, ***Lehman***, ***League of Oregon Cities***, ***Swett***, and ***LINT***. Of those, ***Armatta***, ***Lehman***, ***League of Oregon Cities***, ***Swett***, and ***LINT*** were post-election challenges to enacted measures.[3] There is no administrative procedure available at the post-election stage for challenging such enacted measures, so the administrative exhaustion requirement does not apply there. "First and foremost, a party seeking judicial review of agency action may not bypass **available** administrative remedies in favor of immediate access to the courts." ***Ayres v. Board of Parole and Post-prison Supervision***, 194 Or App 429, 435, 97 P3d 1 (2004). Thus, the absence in those cases of indication that plaintiffs first pursued their issues at the Secretary of State is not relevant to this case.

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3. ***Armatta v. Kitzhaber,*** 327 Or 250, 959 P2d 49 (1998) (post-election challenge to Measure 40 of 1996, amending the Oregon Constitution in various ways pertaining to criminal sentences and rights of victims).

   Lehman v. Bradbury, 333 Or 231, 37 P3d 989 (2002) (post-election challenge on ***Armatta*** grounds to Measure 3 of 1992, imposing terms limits on public offices).

   Swett v. Bradbury, 333 Or 597, 43 P3d 1094 (2002) (post-election challenge on ***Armatta*** grounds to Measure 62 of 1998, setting requirements for signature gathering and some campaign finance reporting).

   League of Oregon Cities v. Oregon, 334 Or 645, 56 P3d 892 (2002) (post-election challenge on ***Armatta*** grounds to Measure 7 of 2000, requiring compensation for reductions in property value).

   Lincoln Interagency Narcotics Team (LINT) v. Kitzhaber, 188 Or App. 526, 72 P3d 967 (2003), *review allowed*, 336 Or 376 (2004) (post-election challenge on Armatta grounds to Measure 3 of 2000, restricting civil forfeiture of property without conviction of crime).

Each of the other two cases plaintiffs cited (***Ellis***, ***Lowe***) was some form of pre-election challenge.[4] But each of them was filed at a time (1986, 1994) when there existed no opportunity for a pre-election administrative proceeding at the Secretary of State. The Secretary of State did not institute any opportunity for an administrative proceeding to conduct any pre-election review of ***Armatta***-type issues until the 2000 election cycle. See OAR 165-014-0028 (effective November 3, 1998). Thus, there was no pre-election administrative remedy to exhaust in those cases. But, since the 2000 election cycle, there has been a pre-election administrative route to exhaust, and Plaintiffs failed therein to preserve their claim regarding Article IV, Section 25(1).

Plaintiffs also contended below that the exhaustion requirement, if applicable, should also have applied to some of the post-election challenges they cite (***Armatta***, ***Swett***, and ***Lehman***). But the Secretary of State did not allow any pre-election administrative proceeding to consider ***Armatta***-type issues, prior to his adoption of OAR 165-014-0028, effective for petitions submitted for the 2000 election cycle. ***Armatta***, ***Swett***, and ***Lehman*** all involved ballot measures in earlier election cycles, when there existed no pre-election administrative remedy to exhaust.

Plaintiffs cited ***Kafoury v. Roberts***, 303 Or 306, 311, 736 P2d 178 (1987), for a proposition it does not contain. They claim their quotation addresses the "purpose of the exhaustion doctrine," but that is not accurate. Instead, the decision is referring specifically to ORS 250.085(5), a statute applicable only to ballot title challenges and

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4. ***Ellis v. Roberts***, 302 Or 6, 725 P2d 886 (1986) (pre-election challenge to initiative petition pertaining to homestead exemption from property taxes and banning general sales tax on "one subject" grounds).

   Lowe v. Keisling, 130 Or App 1, 882 P2d 91 (1994) (in banc), *review dismissed*, 320 Or 570 (1995) (pre-election challenge to initiative petition pertaining to rights of homosexuals on various grounds, including Guarantee Clause).

not to the exhaustion doctrine in general or to ***Armatta***-type challenges in any event. The exhaustion doctrine was not even mentioned in the case.

Plaintiffs argued that ORS 246.910(1) somehow overcomes the administrative exhaustion requirement. But having standing to file suit is not the same as satisfying the exhaustion requirement. The cases where administrative exhaustion has been required involve statutes with language quite similar to ORS 246.910(1), which authorizes suit by "a person adversely affected by any act or failure to act by the Secretary of State * * *." In ***Trujillo v. Public Safety Supply***, 336 Or 349, 84 P3d 119 (2004), for example, the Court ruled that plaintiffs had not exhausted their administrative remedies, even though the applicable statute authorized the filing of a court action by "any party affected by an order of the Workers' Compensation Board." ORS 656.298(1). The existence of a statute authorizing "any party affected" to go to court does not supersede the administrative exhaustion requirement, which the courts have ruled is the "general rule of administrative law" in Oregon. ***Ayres***, 194 Or App at 435, quoting ***Mullenaux v. Dept. of Revenue***, 293 Or 536, 539, 651 P2d 724 (1982).

Plaintiffs contended that exhaustion of administrative remedies is required only when that requirement is expressed in the applicable statute. This is not the law in Oregon; see ***Ayres*** and ***Mullenaux***, *supra*. In fact, when the courts have addressed specific statutes requiring administrative exhaustion, they have been careful to state that they are nevertheless applying the general rule of exhaustion of administrative remedies.

> To be entitled to judicial review of an aspect of an agency action, ORS 305.275(4) requires that the party must have exhausted his administrative remedies. **Without deciding whether the statute requires something more than the general rule of exhaustion of administrative remedies**, we hold that the statute requires at least as much as the rule. **This requires that a party must have properly raised the issue before the**

> **agency.** *Marbet v. Portland General Electric Co.,* 277 Or 447, 456, 561 P2d 154 (1977); *Neeley v. State Compensation Dept.,* 246 Or 522, 426 P2d 460 (1967). * * *
>
> > In this sense, as we noted in *Marbet*:
> >
> > "The requirement that a party must have objected before the agency **to errors he asserts on judicial review** is one facet of the general doctrine that a party must exhaust his administrative remedies."
>
> 277 Or at 456, 561 P2d 154. *See* 3 K. C. DAVIS, ADMINISTRATIVE LAW TREATISE § 20.06 (1958). A party does not exhaust his administrative remedies simply by stepping through the motions of the administrative process without affording the agency an opportunity to rule on the substance of the dispute.

Mullenaux, 293 Or at 540-41 (emphasis added).

> Plaintiffs claimed:
>
> There are no "applicable statutes or rules" that require an elector to file a "separate vote" objection with the Secretary as a prerequisite for bringing an action under ORS 246.910(1).

The "applicable statutes or rules" in this case are the Secretary of State rules that allow any elector to challenge a prospective petition on constitutional procedural (***Armatta***) grounds by filing comments within 10 business days of the issuance of a draft ballot title for the petition. OAR 165-014-0028. As noted above, there does not need to be a statute that mandates administrative exhaustion, as that is the "general law" in Oregon. Further, there was an opportunity for anyone who believed that a prospective petition violated the separate vote requirement to present their arguments to the Secretary of State, pursuant to the schedule set forth in OAR 165-014-0028. Here, Plaintiffs availed themselves of that process but failed to present to the Secretary of State the claim they are presenting to this court, that IP 8 amends both Article I, Section 8 and Article IV, Section 25(1). Thus, Plaintiffs failed to satisfy the applicable procedures, as to the only substantive claim they are pursuing in this court.

As noted in ***Ayres***:

> Instead, the party must present the particular challenges it intends to raise on judicial review first to the administrative body whose review must be exhausted. *Id. [Mullenaux]; Outdoor Media Dimensions Inc. v. State of Oregon,* 331 Or 634, 661-62, 20 P3d 180 (2001).

Ayres, 194 Or App at 435. Here, Plaintiffs' only "particular challenge" is that IP 8 amends both Article I, Section 8 and Article IV, Section 25(1). This particular challenge was not presented first to the administrative body. Thus, it is not cognizable in this court and must now be dismissed.

As stated in ***Mullenaux***, *supra*, the complaining party must have "afford[ed] the agency an opportunity to rule on the substance of the dispute." Here, Plaintiffs' claim is that IP 8 amends both Article I, Section 8 and Article IV, Section 25(1). Since that claim was never mentioned in the administrative proceeding, it is clear that ***Mullenaux*** requires dismissal of this action.

Mullenaux also states that plaintiffs "forfeited their right of judicial review on the merits," by failing to "preserve the allegation of error by timely and adequately addressing the merits before the agency." 293 Or at 541. What are the merits of Plaintiffs' claim here? They are whether IP 8 amends both Article I, Section 8 and Article IV, Section 25(1). There was zero presentation of the merits of this claim to the agency.

Plaintiffs cited cases pertaining not to the doctrine of administrative exhaustion but to the preservation of error at trial. This is not at all the same doctrine. The governing cases on administrative exhaustion, cited above, are quite clear in requiring the plaintiff to "present the particular challenges it intends to raise on judicial review first to the administrative body," to "afford the agency an opportunity to rule on the

substance of the dispute," and to "timely and adequately address[] the merits before the agency."

Further, even the cases on preserving error at trial do not support Plaintiffs. In ***State v. Walker***, 192 Or App 535, 86 P3d 690, *review denied*, 337 Or 327 (2004), the court allowed the State to discuss the legislative history of the statute in its appellate briefs, even though that history was not presented in the trial court. This result is unremarkable and irrelevant to the doctrine of administrative exhaustion. Reference to legislative history is merely a type of legal argument on an issue already raised. Here, however, Plaintiffs seek to introduce an issue never raised at the agency level. As for ***State v. Hitz***, 307 Or 183, 188, 766 P2d 373 (1988), what Plaintiffs seek to present to this court is not merely a "particular argument" for a position already presented to the agency. Instead, Plaintiffs seek to present an entirely new issue or claim. And ***Stull v. Hoke***, 326 Or 72, 77, 948 P2d 722 (1997) involved only a new "alternate argument" regarding the issue of whether claims were barred by the statute of limitations.

In their letter to the Secretary of State, Plaintiffs did not (and could not, under the doctrine of administrative exhaustion) preserve a "broader legal issue" consisting of a claim about IP 8 that they never mentioned in the administrative proceeding. That rationale would destroy the doctrine of administrative exhaustion, as any party could merely assert that a prospective petition is "procedurally unconstitutional" or "does not comply with Article XVII" and then raise dozens of specific new issues on appeal of the Secretary's decision. This is exactly what the doctrine of administrative exhaustion is intended to avoid. At the agency level, Plaintiffs did not "make a particular argument" in support their position that IP 8 amends both Article I, Section 8 and Article IV, Section 25(1). They never even raised that issue or claim to the agency.

III. PLAINTIFFS FAILED TO SHOW FACTS SUFFICIENT TO CONFER STANDING OR JUSTICIABILITY.

A. PRESERVATION OF ISSUE.

This argument was fully presented to the trial court in the 5 documents listed at page 2 of this brief, but the trial court did not reach it.

B. STANDARD OF REVIEW FOR AFFIRMING TRIAL COURT DECISION ON ALTERNATIVE GROUNDS.

A reviewing court may uphold trial court's decision on grounds different from those relied on at trial if, on *de novo* review, the appellate court finds necessary facts to support alternative grounds. ***Progressive Specialty Ins. Co. v. Carter***, 126 Or App 236, 241, 868 P2d 32, 35 (1994); ***State Farm Fire v. Sevier***, 272 Or 278, 298, 537 P2d 88 (1975).

C. ARGUMENT.

The Oregon Court of Appeals has recently adopted a more searching inquiry into the standing of those who seek to invoke the jurisdiction of the Oregon courts. In ***Barton v. City of Lebanon***, 193 Or App 114, 88 P3d 323 (2004), the court outlined this analysis:

> Here, in determining whether the case is justiciable, we begin by determining whether petitioners have standing under the pertinent statutes. *See Utsey [v. Coos County],* 176 Or App at 548-49, 32 P3d 933. In making that determination, we are directed to the requirements of the specific statute that confers standing. *Local No. 290 v. Dept. of Environ. Quality,* 323 Or 559, 566, 919 P2d 1168 (1996) (discussing statutory standing). We then must determine whether the constitutional requirements for standing have been satisfied. *Utsey,* 176 Or App at 548-49, 32 P3d 933. In their brief, each petitioner on review, Barton and Friends of Linn County, asserts both statutory and constitutional standing.
>
> We begin by determining whether Barton has statutory standing. ORS 197.850(1) provides that "[a]ny party to a proceeding before the Land Use Board of Appeals under ORS 197.830 to 197.845 may seek judicial review of

> a final order issued in those proceedings." In turn, OAR 661-010- 0010(11) provides that, generally, a party to an appeal to LUBA includes the petitioner. Here, Barton was a petitioner before LUBA. Accordingly, he has statutory standing to seek review in this court.
>
> That conclusion, however, does not end our inquiry into Barton's standing. In *Utsey,* we said that, "regardless of what the legislature provides regarding the standing of litigants to obtain judicial relief, the courts *always* must determine that the constitutional requirements of justiciability are satisfied." 176 Or App at 548, 32 P3d 933 (emphasis in original). Specifically, we reasoned that (1) the party that invokes the jurisdiction of the court has the "obligation to establish the justiciability of its claim," *id.* at 549, 32 P3d 933; (2) to establish that the claim is justiciable, the party "must demonstrate that a decision in this case will have a practical effect on its rights," *id.* at 550, 32 P3d 933; and (3) [t]he case law concerning the 'practical effects' requirement clearly states that an abstract interest in the proper application of the law is not sufficient," *id.* Under that standard, Barton must demonstrate that a decision will have a practical effect on his rights.

193 Or App at 117-18, 88 P3d at 325-26.

Here, plaintiffs' alleged statutory basis for standing was ORS 183.484(1), ORS 246.910, and ORS 28.010. Appellants' Brief fails to state the statutory source of trial court jurisdiction and simply mentions that "this is an action for declaratory and injunctive relief." Thus, it appears that Plaintiffs-Appellants have abandoned their assertion that the case was brought under ORS 183.484(1) or ORS 246.910. Under these two statutes, a plaintiff must show that he or she is adversely affected or aggrieved by the agency action. ORS 183.484(3); ORS 246.910(1). Plaintiffs made no such showing.

The declaratory judgments statute, ORS 28.010 et seq., has its own standing requirement, which Plaintiffs did not meet. In ***League of Oregon Cities v. Oregon***, 334 Or 645, 56 P3d 892 (2002), the Court denied that mere status as a voter or taxpayer conferred standing, under the declaratory judgment statutes, upon plaintiffs challenging an initiative (Measure 7 of 2000) on "separate vote" grounds.

> Thus, to establish standing, a plaintiff must show that the plaintiff is a "person" as defined in ORS 28.130 and that the plaintiff's "rights, status or other legal relations are affected" by the law or enactment at issue.

> In identifying the requisite "[e]ffect[ ]" to establish standing under ORS 28.020, this court has held that a plaintiff must show some injury or other impact upon a legally recognized interest beyond an abstract interest in the correct application or the validity of a law. *Eckles v. State of Oregon,* 306 Or 380, 385, 760 P2d 846 (1988). In addition, the plaintiff's showing of that injury or other impact must not be "too speculative." *Gruber v. Lincoln Hospital District,* 285 Or 3, 7, 588 P2d 1281 (1979).
>
> With those requirements in mind, we turn to the evidence of injury or other impact that plaintiffs offered before the trial court. Because we are reviewing a grant of summary judgment, we view the facts and all reasonable inferences that may be drawn from them in favor of the nonmoving parties--in this case, the state and intervenor. *Robinson v. Lamb's Wilsonville Thriftway,* 332 Or 453, 455, 31 P3d 421 (2001).
>
> B. *McCall Plaintiffs*
>
> *McCall* plaintiffs' complaint included the following allegations that are relevant to our discussion:
>
> > "Plaintiffs are taxpayers and registered voters in Oregon. They voted in the November 7, 2000, general election. Some or all of them own land in areas that are subject to regulations restricting the use of private real property.

334 Or at 658-59. The Court concluded that status as taxpayers and voters in Oregon was not sufficient.

> *McCall* plaintiffs McCall, MacPherson, and Swaim also argue that they have standing as taxpayers and as voters; plaintiff Swaim further argues that he has standing as a "public official" as described by the Court of Appeals in *Multnomah County v. Talbot,* 56 Or App 235, 641 P2d 617 (1982), which opinion this court adopted as its own, *Multnomah County v. Talbot,* 294 Or 478, 657 P2d 684 (1983). We decline to address those arguments, other than to note our agreement with intervenor that, according to this court's case law describing those theories of standing, plaintiffs McCall, MacPherson, and Swaim have failed to establish it. *See Hanson v. Mosser,* 247 Or 1, 10-11, 427 P2d 97 (1967) (plaintiffs had standing as taxpayers, because they alleged that unlawful expenditures of public funds pursuant to questioned contract would increase their tax burden), *overruled on other grounds by Smith v. Cooper,* 256 Or 485, 488, 475 P2d 78 (1970); *see also Webb v. Clatsop Co. School Dist. 3,* 188 Or 324, 328-29, 215 P2d 368 (1950) (plaintiffs had standing as voters, because they alleged that polls had closed one hour earlier than had been publicized, preventing one plaintiff from voting, and because, at polling place, one plaintiff improperly had been disqualified from voting).

334 Or at 659. Thus, the Court denied standing to plaintiffs who stood in the same position as the Plaintiffs in this case--registered voters who have not "show[n] some injury or other impact upon a legally recognized interest beyond an abstract interest in the correct application or the validity of a law."

Plaintiffs here did not even allege facts which satisfy either the statutory or the constitutional standing and justiciability requirements. The only alleged facts pertinent to their standing to bring their First Claim for Relief (multiple amendments) are in ¶¶ 10-11 of the Amended Complaint:

10.

> Article XVII, section 1, of the Oregon Constitution is intended to protect the integrity of the process used to change the Oregon Constitution. IP 8 directly implicates the vices that the separate vote requirement guards against: logrolling and obfuscation. Plaintiffs have the right, guaranteed to them by Article XVII, section 1, of the Oregon Constitution, not to be required to cast a vote on proposed constitutional amendments that change multiple sections of the Constitution in ways that are not closely related. Furthermore, all electors in Oregon, including plaintiffs, have the right not to be asked to sign a petition for a proposed constitutional amendment that fails to comply with the procedural requirements of the Constitution.

11.

> The purpose of Article XVII, section 1, of the Oregon Constitution would be frustrated and plaintiffs and all other Oregon voters would be irreparably harmed if plaintiffs were restricted to a post-election challenge to IP 8.

Regarding ¶ 11, Plaintiffs fail even to identify the nature of the irreparable harm they allege. As for ¶ 10, Plaintiffs are alleging legal harms that have no basis. They claim the have "the right * * * not to be required to cast a vote on proposed constitutional amendments that change multiple sections of the Constitution in ways that are not closely related." But the certification of IP 8 for circulation by the Secretary of State does not require anyone to cast a vote on any proposed constitutional amendment. First, they will not even be offered a chance to vote on IP 8, unless it qualifies for the November 2006

general election ballot. Second, even then plaintiffs are not forced to vote on that measure or any other measure or candidate race.

They claim they "have the right not to be asked to sign a petition for a proposed constitutional amendment that fails to comply with the procedural requirements of the Constitution." This will be news, particularly to members of the ACLU. Plaintiffs fail to identify the source of this "right," which appears in utter conflict with the First Amendment of the US Constitution and Article I, Section 8, of the Oregon Constitution, both of which guarantee freedom of speech. The United States Supreme Court has repeatedly held that the First Amendment protects the rights of petitioners to communicate with voters. ***Buckley v. American Constitutional Law Found.***, 525 US 182, 119 SCt 636, 142 LEd2d 599 (1999); ***Meyer v. Grant***, 486 US 414, 108 SCt 1886, 100 LEd2d 425 (1988). Such communication from petitioners to voters is the most highly protected speech and can be restricted only by means narrowly tailored to meet a critical state interest. ***McIntyre v. Ohio Elections Comm'n***, 514 US 334, 347, 115 SCt 1511, 131 LEd2d 426 (1995); ***First Nat. Bank of Boston v. Bellotti***, 435 US 765, 776-777, 98 SCt 1407, 1415-1416, 55 LEd2d 707 (1978). What is the right, now claimed by Plaintiffs, to be free of "being asked to sign a petition," regardless of its subject? They have identified no such right and consequently have no standing to pursue this case. In addition, they indicate no likelihood they will be asked to sign IP 8.

Plaintiffs below stated that the Oregon Supreme Court has allowed any registered voter to bring an actions to challenge initiatives on "separate-vote" grounds. All of those challenges they cited (including ***Swett*** and ***Armatta***) were post-election challenges to enacted measures. There, voters were indeed affected by the enacted measures. Here, however, there is no enacted measure but merely a petition upon which Delk and

colleagues wish to gather signatures. Thus, Plaintiffs needed to show they would suffer cognizable harms from (1) the process of gathering signatures to place the measure on the ballot or (2) the presence of the measure on the ballot, should the signature gathering succeed. Plaintiffs appear to have understood this in making the allegations in their complaint, ¶ 10. It is up to this court to decide whether those allegations of harm were proven and were sufficient or even legally cognizable.

IV. IP 8 DOES NOT RUN AFOUL OF THE "ONE AMENDMENT, SEPARATE VOTE" REQUIREMENT.

Plaintiffs claim that IP 8 violates "separate vote" requirement of Article XVII, section 1, by offering multiple amendments that are not closely related.

IP 8 would add a single sentence to the Oregon Constitution:

> Be it enacted by the People of the State of Oregon, there is added an Article II, Section 24, of the Constitution of Oregon, as follows:
>
> > **Notwithstanding any other provision of this Constitution, the people through the initiative process, or the Legislative Assembly by a three-fourths vote of both Houses, may enact and amend laws to prohibit or limit contributions and expenditures, of any type or description, to influence the outcome of any election.**

Plaintiffs' entire argument focuses solely upon the "three-fourths vote of both Houses" requirement and upon no other element of IP 8.

Plaintiffs' brief misconceives IP 8, which is a specific expansion of legislative power, not a limitation on existing legislative power. IP 8 does not write upon a blank slate. In ***Vannatta v. Keisling***, 324 Or 514, 931 P2d 770 (1997), the Court held that Article I, Section 8, does not allow any legislative body in Oregon to prohibit or limit political campaign contributions or expenditures. *See id.*, 324 Or at 541, 931 P2d at 787. It does not matter whether the Legislature enacts such a statute by a simple majority vote of both

Houses, or by a 3/4 supermajority vote of both Houses, or by a unanimous vote of both Houses. The Oregon Supreme Court has ruled that Article I, Section 8, does not allow the Oregon Legislature to enact or such statutes at all. Thus, IP 8 affects Article I, Section 8, as currently interpreted by the Oregon Supreme Court, although it does not "change" it.

In any event, Plaintiffs' argument is that IP 8 enacts substantive and unrelated "changes" to both Article I, Section 8 and Article IV, Section 25(1). IP 8 does not change Article IV, Section 25(1). If the Court finds a change, it is necessarily closely related to the other change made by IP 8.

A. IP 8 IS A SPECIFIC EXPANSION OF LEGISLATIVE AUTHORITY THAT DOES NOT CURRENTLY EXIST IN THE OREGON CONSTITUTION.

Plaintiffs' claim is based on their repeated statement that allowing the Legislature to enact a statute by simple majority votes in both houses is the status quo under Article IV.[5] Dealing with the subject of campaign finance limitations, however, the status quo is that the Legislature cannot enact prohibitions or limitations on campaign contributions or expenditures [hereinafter "campaign finance limitations"] at all, regardless of the vote counts. Nor can the people using the initiative process enact such prohibitions or limitations by statute.

Article IV, Section 25(1), does not establish that the Legislature is entitled to enact bills by simple majority votes. That section states that "a majority of all the members elected to each House shall be necessary to pass every bill or Joint Resolution." It does not state that a majority of each house is **sufficient** to pass every bill or Joint Resolution. **And Article IV, Section 25(1), certainly does not establish that the Legislature can**

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5. See note 10, *infra*.

enact bills prohibiting or limiting political campaign contributions or expenditures by majority vote. Thus, IP 8 is in no way a limitation on legislative power. It is a specific expansion of legislative power, allowing the Legislature to enact, by 3/4 votes of both houses, a type of bill that currently the Legislature has no power to enact at all, due to ***Vannatta***. Thus, IP 8 does not amend Article IV, Section 25(1), because Section 25(1) does not currently authorize the Legislature to enact bills pertaining to campaign finance limitations by majority vote or any other type of vote.

B. THE EARLIER MEASURES CITED BY PLAINTIFFS ARE LIMITATIONS ON EXISTING LEGISLATIVE POWER.

IP 8 is thus entirely different from the previous initiatives Plaintiffs cite, Measure 10 (1994) and Measure 26 (1996). Those initiatives sought to limit legislative power to enact bills that the Legislature could enact, by simple majority votes, on the subjects of criminal sentences and taxes. Thus, it was only necessary for those initiatives to directly amend Article IV, Section 25(1). Amending that section to require a 3/4 vote of both houses on bills pertaining to campaign contribution limits, however, would be meaningless, because (as noted above) the Legislature currently has no power to enact such limits at all.

C. IP 8 DOES NOT AMEND ARTICLE IV, SECTION 25(1).

IP 8 does not amend Article IV, Section 25(1), at all, because Article IV, Section 25(1), does not by its own terms require that a simple majority vote of both houses is **sufficient** for enactment of a bill.

Instead, it states that a majority of those elected to each House is "necessary" to pass a bill or joint resolution. IP 8 has no effect on this provision. If IP 8 is enacted, Article IV, Section 25(1), will remain fully in place. It will still be "necessary" for any and every bill in the Legislative Assembly to obtain majority votes in order to pass, including

every bill pertaining to political campaign contributions or expenditures. For those bills, majority votes will still be "necessary" but will not be sufficient. Today, even a 3/4 vote is not sufficient to enact such bills.

D. THE OREGON CONSTITUTION HAS ALREADY BEEN AMENDED BY INITIATIVE TO PROTECT CERTAIN INITIATIVE-ENACTED STATUTES FROM ENCROACHMENT BY THE LEGISLATIVE ASSEMBLY.

The Oregon Constitution has already been amended, by initiative, to protect certain initiative-enacted statutes from amendment or alteration by simple majority votes in the Legislative Assembly.

The relationship between Measure 10 and Measure 11 (1994) was noted in ***State ex rel. Huddleston v. Sawyer***, 324 Or 597, 627, 932 P2d 1145, 1163 (1997), *cert denied sub nom*, ***Sawyer v. Oregon, Huddleston***, 522 US 994, 118 SCt 557, 139 LEd2d 399 (1997). It is the same relationship that exists between IP 8 and Petition #7 (2006). In 1994 Oregon voters approved both Measure 10 and Measure 11. Measure 10 amended the Oregon Constitution to add Article IV, Section 33, which states:

> Notwithstanding the provisions of section 25 of this Article, a two-thirds vote of all the members elected to each house shall be necessary to pass a bill that reduces a criminal sentence approved by the people under section 1 of this Article.

"Section 1 of this Article" refers to Article IV, Section 1, which sets forth the initiative powers of the people.

Measure 10 was enacted by initiative at the same time as Measure 11, a statute enacting mandatory minimum sentences. Thus, the proponents of mandatory minimum sentences sought, with success, to enact a statute specifying certain terms and then to protect that statute from impairment by simple majority votes in the Legislative Assembly.

This shield for the Measure 11 mandatory minimum sentences has been in place since 1994.

IP 8 and IP 7 (2006) seek to create a similar system. The original chief petitioner on both petitions was David Delk. IP 7 is a proposed statute that includes detailed provisions establishing limits and prohibitions on political campaign contributions and expenditures.[6] IP 8 seeks to protect such an initiative-enacted statute from impairment by simple majority votes in the Legislative Assembly. But IP 8 cannot be enacted in the form of a mere restriction on the power of the Legislature, as was Measure 10 (1994). Measure 10 (1994) was a restriction on the existing power of the Legislature to enact or amend statutory criminal sentences by majority votes in both houses. Due to ***Vannatta***, the Legislature currently has no power to enact or amend campaign finance limitations. Thus, IP 8 must provide a limited expansion of the power of the Legislature and not a restriction of it.

The proponents of mandatory minimum sentences believed that the sentences they desired would not remain in place, if the Legislative Assembly could reduce them by simple majority vote. Similarly, the relationship of IP 7 and IP 8, both filed by the same Chief Petitioner, indicate that the supporters of limits on political campaign contributions

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6. Its full text available at http://www.sos.state.or.us/elections/irr/2006/007text.pdf. Its certified ballot title caption and yes/no questions state:

> **REVISES CAMPAIGN FINANCE LAWS: LIMITS OR PROHIBITS CONTRIBUTIONS AND EXPENDITURES; ADDS DISCLOSURE, NEW REPORTING REQUIREMENTS.**
>
> **RESULT OF "YES" VOTE:** "Yes" vote limits or prohibits certain contributions and expenditures on candidate campaigns; limits candidate's spending of personal funds; requires contributor disclosures; adds new reporting requirements.
>
> **RESULT OF "NO" VOTE:** "No" vote retains current law, which does not limit contributors, contributions to, or expenditures for state or local public office candidates; maintains existing reporting requirements.

believe that the limits set forth in IP 7 would not remain in place, if the Legislative Assembly could change them by simple majority vote. After IP 7 is enacted in November 2006, every member of the Legislative Assembly for 2007 regular session will have been elected under the old system of unlimited contributions and unlimited expenditures and will have every motivation to retain the system under which each of them succeeded in gaining office. This is not idle speculation. Before the Oregon Supreme Court on February 6, 1997, invalidated similar statutory limits on contributions and expenditures enacted by Measure 9 of 1994 (***Vannatta***, *supra*), the 1997 regular session of the Legislative Assembly saw the preparation and introduction of a bill to repeal those limits (HB 2548).

In other states, campaign finance reform measures have subsequently been gutted by legislatures, acting by majority vote but not by 3/4 vote of each house. For example, in December 2004 a special session of the Ohio Legislature enacted, and the Governor signed, a bill to increase contribution limits by a factor of four (to $10,000 per person to a candidate) and to revoke bans on certain corporate and labor contributions and expenditures. The bill passed 20-10 in the senate and 55-33 in the house (both less than 3/4).[7] In June 2003, the Massachusetts Legislature by voice vote repealed the campaign finance reform measure enacted there by initiative (which included public funding), despite

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7. Delk requests judicial notice of these facts about the Ohio bill, which are not subject to reasonable dispute in that they are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Rule 201(b), Oregon Rules of Evidence, ORS 40.065. The facts are available from the Ohio Legislature itself at:

   http://www.legislature.state.oh.us/BillText125/125_HB_1_SSEH_FA_N.pdf

   Attachment 1 to this brief consists of pages from the official summary of the Act, indicating the changes in contribution limits and the tally of votes in each house of the Ohio Legislature.

the fact that "voters approved it overwhelmingly in 1998." *Massachusetts Legislature Repeals Clean Elections Law*, NEW YORK TIMES, June 21, 2003, p. A16.[8] IP 8 would not allow the Oregon Legislature by voice vote to repeal or alter voter-approved contribution or expenditure limits. Instead, it would require a 3/4 vote of both houses.

E. PLAINTIFF'S ANALYSIS WOULD PERMANENTLY FORBID ANY CHANGE TO THE OREGON CONSTITUTION TO EXPAND THE POWER OF THE LEGISLATURE IN A SPECIFIC LIMITED MANNER.

As noted above, IP 8 would expand the power of the Legislature by enabling it to enact and amend statutes pertaining to campaign finance limitations by a 3/4 vote of both houses. Under the current Oregon Constitution, the Legislature has no power to enact or amend such statutes at all, due to ***Vannatta***.

According to Plaintiffs' analysis, the Oregon Constitution can never be amended to grant additional power to the Legislature, unless the Legislature is allowed to use that power by means of majority vote. Plaintiffs analysis would necessarily forbid any amendment to the Oregon Constitution authorizing, for example, the Oregon Legislature to adopt a sales tax by a 3/4 vote of both houses. According to Plaintiffs, any new or expanded legislative authority must be available for the Legislature to exercise by majority votes only.

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8. Delk requests judicial notice of these facts about the Massachusetts repeal, which are not subject to reasonable dispute in that they are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Rule 201(b), Oregon Rules of Evidence, ORS 40.065. The facts are available from the Multnomah County Library at:

   http://proquest.umi.com/pqdweb?index=0&did=349871401&SrchMode=1&sid=3&Fmt=3&VInst=PROD&VType=PQD&RQT=309&VName=PQD&TS=1119043170&clientId=11892#fulltext

   Attachment 2 to this brief is the cited NEW YORK TIMES article.

Under their approach, the granting of new limited power to the Legislature must be done with at least two amendments to the Oregon Constitution--one amendment to grant the new power and another amendment to limit the Legislature's authority to use that power. If one amendment is enacted by voters and the other is not, then the state will end up with either a situation not intended at all by the chief petitioners (new, unrestricted power to the Legislature) or with nothing (a limitation on a power that does not exist). Plaintiffs offer no rationale for this completely irrational restriction on how voters can amend the Oregon Constitution.

If IP 8 did not have the 3/4 vote requirement, it would represent a larger change to the Oregon Constitution, as it would make it easier for the Legislature to enact campaign finance limitation statutes than the IP 8 chief petitioners desire. Thus, Plaintiffs are arguing that the "separate vote" requirement mandates that the supporters of campaign finance reform offer to voters an amendment to the Oregon Constitution of **greater** magnitude than the one they seek to offer in IP 8. This stands the ***Armatta*** rationale on its head.

Under ***Armatta*** and its progeny, the concern is that voters are offered amendments that are too broad in scope, so that the motivation of voters cannot properly be ascertained. Here, Plaintiffs are contending that it would be fine to offer voters an initiative that would allow the Legislature to enact campaign contribution limits by simple majority vote but that it contravenes ***Armatta*** to offer voters an initiative of more limited scope that authorizes the Legislature to enact campaign contribution limits by a 3/4 vote of both houses.[9] Thus, according to Plaintiffs, ***Armatta*** somehow now requires that

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9. Note that no part of Plaintiffs' arguments is based on the fact that Initiative Petition 8 would allow voters to enact campaign contribution limits by majority vote of the people through the initiative process.

voters be banned from considering a smaller change to the Oregon Constitution but be allowed to consider a larger change to the Oregon Constitution on precisely the same subject.

It is impossible to break IP 8 into logical separate questions. The chief petitioners do not want a system of campaign finance reform that can be changed by simple majority vote of the Legislature. Instead, they propose a system under which campaign contribution limits adopted by voters in the initiative process cannot be changed by the Legislature, except by a 3/4 vote of both houses. This would allow the Legislature to correct any drafting errors in limits enacted by initiative, while not allowing a simple majority of the Legislature to abolish or significantly weaken the limits enacted by initiative.

Further, any breakdown into multiple questions would make no sense. One initiative (Measure A) could allow the Legislature to enact campaign contribution limits, without mentioning whether such would require a simple majority vote or a supermajority vote. It is difficult to fathom what the other initiative (Measure B) would be. Perhaps:

> "Should a 3/4 vote of both houses of the Legislature be required to enact or amend campaign contribution limits, if the Legislature is allowed to legislate in this area by some other amendment to the Oregon Constitution?"

If Measure A alone passes, that is a system, proven ineffective elsewhere, that is not the system desired by the chief petitioners. If Measure B alone passes, it is meaningless.

V. SPECIFIC COMMENTS ON APPELLANTS' BRIEF.

Appellants' (Plaintiffs) Brief (p. 7) states:

> IP 8 would create an exception to the requirement in Article IV, section 25, that "every bill" becomes law upon approval by a majority vote in both Houses . . ..

In fact, Article IV, Section 25(1), does not allow a bill pertaining to limits on campaign contributions or expenditures to "become law upon approval by a majority vote in both Houses." According to ***Vannatta***, the Legislature cannot enact such limits at all. Thus, IP 8 does not create an "exception" to Article IV, Section 25(1), because Article IV, Section 25(1), does not apply to limitations on campaign financing in the first place.

Plaintiffs (p. 15) restate the same incorrect argument:

> Article IV, section 25(1), currently provides, in relevant part, that "a majority of all the members elected to each House shall be necessary to pass every bill or Joint resolution." If IP 8 is adopted, that requirement will change.

As noted above, it is simply not true that Article IV, Section 25(1), currently allows the Legislature to pass "every bill or Joint resolution" by a simple majority vote of members of both houses. It does not allow them to pass bills that would create prohibitions or limitations on campaign contributions, due to ***Vannatta***.[10]

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10. Plaintiffs (p. 18) restate the same incorrect argument: "The provision in Article IV, section 25(1), that a bill may be passed by majority vote of both houses is itself a substantive constitutional requirement . . .." At present, a bill on campaign finance limitations may not be passed by a majority vote of both houses, due to ***Vannatta***.

    Plaintiffs (p. 22) restate it a bit differently: "IP 8 combines a proposal to change the legislative power that is defined and limited in Article II (namely, by raising the number of votes needed to pass certain legislation in the Legislative Assembly) . . .." To the contrary, IP 8 does not **raise** the number of votes needed to pass the "certain legislation" it addresses (campaign finance limitations). Currently, there is no such thing as a "number of votes needed to pass [this] certain legislation in the Legislative Assembly," due to ***Vannatta***. If anything, IP 8 reduces the number of votes needed in the Legislature to pass this "certain legislation" from infinity to a mere 3/4 vote of each house.

    Plaintiffs (p. 22) then go way overboard:

    > The simple-majority requirement for passing laws that the framers placed in Article *TV,* section 25(1), reflected a basic premise of democracy: majority rule. It is a rule that applies across the board, regardless of the subject matter of a particular bill. The framers decided that *all* bills, relating to *any* subject matter, could become law upon approval by a simple majority vote of both Houses of the legislature.

(continued...)

Plaintiffs (p. 8) attempt to reach the conclusion that, under the trial court's reasoning, the earlier measures which established supermajority requirements for the enactment of certain bills would not have amounted to a "change" to Article IV, Section 25(1). Of course, Measure 25 did change Section 25(1), because it directly altered its language and added Section 25(2). Measure 10 enacted Article IV, Section 33, which did not change Article IV, Section 25(1). And, as noted above, both of these other measures reduced the authority of the Legislature to enact certain statutes by majority vote. IP 8, conversely, does not reduce the authority of the Legislature to enact campaign finance limitations by majority vote, because the Legislature has no such authority at all, due to ***Vannatta***.

As for Plaintiffs various hypothetical amendments (pp. 10-11), they prove nothing. Their hypothetical about voting age is inapplicable, because its premise is that:

> Article II, section 2(1), provides, in part, that every citizen of the United States is entitled to vote in all elections "if such citizen: (a) Is 18 years of age or older.

Raising the age requirement to 21 for elections on measures pertaining to campaign finance would obviously contradict an existing requirement that anyone is **entitled** to vote in **all elections**. Here, however, the Legislature is not currently entitled to enact campaign finance limits by majorities in both houses. Instead, it has no current

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10.(...continued)

> That statement is clearly wrong. If all bills, relating to any subject matter, could become law upon approval by a simple majority vote of both houses of the Legislature, then both ***Deras v. Myers***, 272 Or 47, 535 P2d 541 (1975), and ***Vannatta*** were decided wrongly, and the Oregon Supreme Court could not have concluded that the legislative power in Oregon, shared by the Legislature and the people using the initiative process, does not extend so far as to allow the enactment of campaign contributions limits, regardless of any vote count.

authority to enact such limitations at all. Thus, the accurate analogy would be an amendment allowing voters of age 21 or above to vote in elections that they currently banned from (which is, of course, completely different from the hypothetical offered by Plaintiffs). Further, Plaintiffs hypothesize that the new measure would directly amend Article II, section 2(1). Yes, when a measure directly amends a section of the Oregon Constitution, that section is indeed amended. But that is not Plaintiff's argument here, because IP 8 does not amend Article IV, Section 25(1), directly or indirectly.

Their analogy about voter residency requirements is similarly flawed. It envisions a measure which restricts the rights of voters by allowing fewer of them to vote on a campaign finance limitation measure. But IP 8 starts from the baseline of no legislative power to enact campaign finance limitations and expands, not restricts, the power of the Legislature.

Their last analogy is even more flawed. Yes, directly amending the age requirement for Governor would change the age requirement for Governor. Any direct change to a provision of the Constitution would change that provision.

Plaintiffs' discussion (pp. 15-16) of ***Armatta*** is not availing. Measure 40 (1996) contained numerous discrete changes to existing rights under the Oregon Constitution. IP 8, on the other hand, consists of one discrete change--expanding, in a limited manner, legislative power to enact and amend statutes that prohibit or limit campaign contributions or expenditures. Further, Measure 40 did indirectly "change" existing provisions of the Oregon Constitution which Measure 40 itself contradicted. For example, giving effect to an 11-1 guilty vote in certain murder cases certainly **contradicted** the then-applicable requirement for a unanimous verdict in such cases. But nothing in IP 8 contradicts Article IV, Section 25(1), because (1) Article IV, Section

25(1), does not currently apply to any statutes which prohibit or limit campaign contributions or expenditures, and (2) Article IV, Section 25(1), does not state that a majority vote in each house is **sufficient** to pass every bill.

Similarly, Measure 3 (1992) (on term limits) and Measure 62 (1998) (changing various provisions involving elections and campaign financing and the gathering of signatures on initiatives and referenda) both contained discrete provisions to accomplish different outcomes. Plaintiffs attempt to argue that the mere fact that IP 8 authorizes a **limited** expansion of the power of the Legislature (to be exercised only by 3/4 votes), instead of a **larger** expansion of its power (to be exercised by majority votes), somehow constitutes two unrelated amendments. It makes no sense.

Finally, Plaintiffs (p. 22) incorrectly state:

> In contrast, the change to Article IV, section 25(1), made by IP 8 carves out an exception to the manner in which the legislature can make laws, and it is a change that is wholly independent of the subject matter of the laws.

That is simply wrong. First, IP 8 does not carve out any exception to Article IV, Section 25(1), because (as noted above), that section of the Oregon Constitution does not currently apply to campaign finance limitation statutes, which cannot be enacted by majority vote now, due to ***Vannatta***. Second, it is absurd to state that any implied effect of IP 8 on Article IV, Section 25(1), is "wholly independent of the subject matter of the laws," when in fact the change in the Oregon Constitution made by IP 8 is completely dependent on the subject matter of the laws.

Dated: June 16, 2005

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing BRIEF OF DEFENDANT-INTERVENOR-RESPONDENT DAVID DELK by first class mail to all other parties listed below, deposited in the U.S. Postal Service at Portland, Oregon, with first class postage prepaid.

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