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 E. DELK,

Defendant-Intervenor-Respondent.

Marion County Circuit Court
No. 04C-20669

CAA127935

RESPONDENT'S SUPPLEMENTAL MEMORANDUM ON JUSTICIABILITY

Appeal from the Judgment of the Circuit Court
for Marion County
Honorable CLAUDIA BURTON, Judge

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INTRODUCTION

The court directed the parties to brief the justiciability of pre-election separate-vote challenges in light of four Oregon Supreme Court cases. Although those cases do not clearly compel a result one way or the other, the better reasoning suggests that pre-election separate-vote challenges are justiciable.

Oregon case law suggests the following distinction: A pre-election challenge to a ballot measure is justiciable if the basis for the challenge is a "form-of-adoption" requirement[1]—a formal or procedural prerequisite to qualify the measure for the ballot. On the other hand, pre-election challenges are not justiciable if the basis for the challenge is a substantive constitutional issue that would arguably render the measure invalid if approved by the people. Separate-vote challenges such as that before the court here fall in the former category, not the latter.

[1] The Oregon Supreme Court uses the phrase "form-of-adoption" requirement to refer to a procedural or formal prerequisite for ballot measures. *See League of Oregon Cities v. Kitzhaber*, 334 Or 645, 656, 56 P3d 892 (2002); *Lehman v. Bradbury*, 333 Or 231, 237, 37 P3d 989 (2002). As used by the Oregon Supreme Court, that phrase includes at least the separate-vote requirement of Article XVII, section 1; the full-text requirement of Article IV, section l(2)(d); and the constitutional revision requirements of Article XVII, section 2. *See League of Oregon Cities*, 334 Or at 656 n.ll.

ARGUMENT

I. Oregon cases recognize that substantive pre-election challenges are not justiciable, but form-of-adoption pre-election challenges are.

The justiciability of pre-election ballot measure challenges turns on two lines of Oregon cases that distinguish between substantive challenges on the one hand and form-of-adoption challenges on the other. One line stands for the general rule that until a measure is approved, challenges to its constitutionality are nonjusticiable. The other recognizes that a form-of-adoption challenge—contending that the measure is legally insufficient to be placed on the ballot—is justiciable. Two of the cases the court directed the parties to address belong to the first line. *See State ex rel* v. *Newbry,* 189 Or 691, 222 P2d 737 (1950); *Johnson v. City of Astoria,* 227 Or 585, 363 P2d 571 (1961). The other two belong to the second line. *See OEA* v. *Roberts,* 301 Or 228, 721 P2d 833 (1986); *Foster v. Clark,* 309 Or 464, 790 P2d 1 (1990). Answering the justiciability question here requires addressing the relationship between those two lines of cases. More specifically, it requires determining whether the central holding of *Newbry—pxQ-*election separate-vote challenges are not justiciable—has survived *Foster,* Although no case clearly dictates a result one way or the other, the better reading of the case law is that *Newbry's* central holding is no longer good law.

A. The early general rule was that substantive pre-election constitutional challenges to ballot measures are not justiciable.

In 1950, the Oregon Supreme Court held that a pre-election separate-vote challenge was not justiciable. *See Newbry,* 189 Or at 697-98. In doing so, the court relied almost exclusively on its earlier decision in *State ex rel. Carson v.*

Kozer, 126 Or 641, 270 P 513 (1928). *See id* at 696-98. In *Kozer* the court ruled that separation-of-powers principles deprive the judiciary of the authority to consider a pre-election challenge so long as ail the technical prerequisites for placing the measure on the ballot are satisfied.[2] *See Kozer,* 126 Or at 648-49. The relator in *Kozer* had alleged that the proposed initiative measure would be unconstitutional if approved, and the complaint alleged violations of five constitutional provisions, two of which would be deemed today substantive, and three of which would be deemed today form-of-adoption requirements. *See Complaint,* flIX-XIII, *Plaintiff-Appellant's Abstract of Record &t* 10-12, 746 OREGON BRIEFS, Tab 5 (1928) (alleging violations of full-length requirement of Article IV, section 22; plain-wording requirement of Article IV, section 21; uniform taxation requirement of Article I, section 32; equal privileges and immunities guarantee of Article I, section 20; and single-subject requirement of Article IV, section 22). But the court's opinion did not distinguish among the types of constitutional violations alleged; indeed, the opinion did not even identify which constitutional provisions were at issue. That suggests that in 1928, the Oregon Supreme Court viewed all pre-election constitutional challenges to be non-justiciable, regardless of whether they were substantive or form-of-adoption requirements. In 1950, the court in *Newbry* simply reaffirmed that rule. Then in

[2] In *Kozer* and *Newbry*, the justiciability question was framed in terms of a separation of powers. *See Kozer,* 126 Or *at 647; Newbry,* 189 Or at 697. But in Foster, the problem identified with pre-election challenges was the general prohibition against advisory opinions. *See Foster,* 309 Or at 469.

1961, the court again sustained the principle in *Johnson v. City of Astoria,* 227 Or at 591-92 (citing *Kozer* and *Newbry).*

That categorical rule has been modified by more recent cases, as explained below. *Newbry* has never been explicitly overruled, as Justice Unis noted in *State ex rel Keisling v. Norblad,* 317 Or 615, 634, 860 P2d 241 (1995) (Unis, J., specially concurring) (discussing and citing *Newbry* with approval). But the court in *Newbry, Kozer,* and *Johnson* did not distinguish between substantive pre-election challenges on the one hand and form-of-adoption challenges on the other. A separate—more recent—line of cases makes that distinction crucial.

B. Under a separate line of cases, challenges asserting form-of-adoption defects in a measure are justiciable.

Despite that general principle of nonjusticiability, there have long been exceptions where the proposed measure is purportedly legally insufficient to qualify for the ballot at all. Thus, in *Kays* v. *McCall,* 244 Or 361, 481 P2d 511 (1966), the court affirmed an injunction preventing the Secretary of State from putting a measure on the ballot where there were insufficient signatures to support it. Similarly, in *McGinnis v. Child,* 284 Or 337, 587 P2d 460 (1978), the court noted the "one exception" to the general rule from the *Kozer* line of cases: a measure may be kept off the ballot if it is "legally insufficient" to qualify. *See McGinnis,* 284 Or at 339. *See also Holmes* v. *Appling,* 237 Or 546, 392 P2d 636 (1964) (proposed constitutional "amendment" that was in fact an entirely new constitution was not entitled to be put on the ballot); *Tillamook PUD v. Coates,* 174 Or 476, 149 P2d 558 (1944) (court had authority to prevent referendum

relating to administrative matters—as opposed to legislative matters—from appearing on the ballot); *Whitbeckv. Funk,* 140 Or 70, 12 P2d 1019 (1932) (proposed referendum not eligible for ballot because it was not "municipal legislation").

In *OEA v. Roberts* decided in 1986, the plaintiffs brought a pre-election challenge to a proposed initiative measure, arguing that the measure contained more than one subject in violation of Article IV, section l(2)(d), of the Oregon Constitution. *See Roberts,* 301 Or at 230. The court noted that *Johnson* and *Newbry* had established that courts "could not consider constitutional challenges to initiative or referendum petitions before the voters adopted the measures." *See id.* at 231. But since 1968, the single-subject requirement of Article IV has applied to *"a. proposed* law or amendment," a fact the *Roberts* court found determinative. *See id.* at 231-32. And because the single-subject requirement is phrased in mandatory language—"shall embrace one subject only"—the court concluded that pre-election review was appropriate.

[3] Technically, *OEA* v. *Roberts* presented the narrow question whether the Secretary of State must determine a proposed measure's compliance with the single-subject requirement before placing it on the ballot. *See OEA* v. *Roberts,* 301 Or at 230, 232. But the court recognized the further principle that "[the single subject requirement of] section l(2)(d) allows pre-election review of the Secretary of State's decision to submit a measure to the voters." *Id.* at 232. The court was apparently recognizing that if the Secretary of State is required to make such a judgment, his or her decision may be challenged before the election takes place. "If the proponents have gathered a sufficient number of signatures, the Secretary then certifies the measure for placement on the ballot. Persons may challenge the Secretary of State's decision to certify or not to certify a measure." *Id.* at 234. *Accord State ex rel. Fidanque* v. *Paulus,* 297 Or 711, 715-16 n. 5, 688 P2d 1303 (1984).

Two years after *OEA v. Roberts* was decided, the court ruled in *City of Eugene* v. *Roberts,* 305 Or 641, 756 P2d 630 (1988), that an "advisory question" asking whether the City of Eugene should be a nuclear-free zone would not be a proper "measure" on which the people could vote. It therefore affirmed the Secretary of State's decision not to place the item on the ballot, despite the fact that the question proposed otherwise met the requirements for such measures. *See City of Eugene v. Roberts,* 305 Or at 645-46.

That left the two lines of cases in an apparent state of tension. The *Kozer/Newbry/Johnson* line suggested that pre-election challenges are nonjusticiable. The other line suggested they are justiciable if the challenge is based on form-of-adoption requirements—*i.e.* the legal sufficiency of the measure, as opposed to its substantive effect.

C. Resolving the tension: the *Foster* distinction

That tension was resolved in 1990 by the Oregon Supreme Court in *Foster v. Clark.* The narrow question presented in *Foster* was whether a proposed ballot measure was "municipal legislation" that could be put to a vote under Article IV, section 1(5), of the Oregon Constitution. *See Foster,* 309 Or at 466. But the intervenors had moved to dismiss for lack of subject matter jurisdiction, raising the justiciability issue. *See id.* at 468. The court restated the general rule from the *Kozer/Newbry/Johnson* line of cases: "[A] court will not inquire into the substantive validity of a measure—*i.e.* into the constitutionality, legality, or effect of the measure's language—unless and until the measure is passed." *Id.* at 469. The court reasoned that such pre-election substantive review would result in an

advisory opinion. *See id.* The court was correct concerning inquiries into substantive validity, because before the measure is approved and has practical effect, there is no live controversy between adverse parties.

On the other hand, the court noted the other line of cases approving certain pre-election challenges: "Oregon courts have inquired into whether matters extraneous to the language of the measure itself disqualify the measure from the ballot." *Id.* The court noted the tension: "The two lines of cases * * * appear to run in different directions." *Foster,* 309 Or at 470.

The court resolved the tension by ruling that the general rule from the *Kozer/Newbry/Johnson* line is inapplicable when the challenge is formal or procedural: "[C]ourts will prevent a measure from being placed on the ballot if the measure is legally insufficient to qualify for the ballot." *Id.* at 469. Entertaining such form-of-adoption challenges does not result in advisory opinions—the problem identified by the court for substantive pre-election challenges, *see id.*—because there exists a live controversy pre-election concerning whether the measure is eligible for the ballot. And the Oregon Supreme Court has implied that any registered voter is adversely affected by an incorrect election ruling by the Secretary of State. *See Ellis* v. *Roberts,* 302 Or 6, 11, 725 P2d 886 (1986).

The distinction drawn by the court in *Foster* can be restated as follows: Pre-election challenges to the substantive validity of a proposed measure are not justiciable, but pre-election challenges asserting legal insufficiency—*i.e.* form-of-

adoption defects—are. In drawing that distinction in *Foster*, the Oregon Supreme Court undermined the central holding of *Newbry*—pre-election separate-vote challenges are not justiciable—without explicitly overruling it.[4]

II. Oregon appellate cases support respondent's interpretation of the *Foster* distinction.

The Oregon Supreme Court has twice followed *Foster*, once for the distinction drawn between justiciable and nonjusticiable pre-election challenges and once on a narrow issue of constitutional interpretation not at issue here. *See Boytano* v. *Fritz*, 321 Or 498, 901 P2d 835 (1995) (justiciability distinction); *Lane Transit Dist* v. *Lane County*, 327 Or 161, 957 P2d 1217 (1998) (narrow interpretive question). In *Boytano*, the court acknowledged the distinction drawn by *Foster*. A court will not inquire into the substantive validity of a measure pre-election, but it will entertain pre-election non-substantive challenges—*i.e.* those involving "matters extraneous to the language of the measure itself." *Boytano*, 321 Or at 501-02. The court then held that a challenge under Article IV, section 1(5), of the Oregon Constitution—asserting that a local initiative is not properly put to a vote where it is not "municipal" in nature—is of the latter type and therefore justiciable pre-election. *See Boytano*, 321 Or at 502.

[4] *Newbry* has not been cited with approval by the Oregon Supreme Court since *Foster* was decided. The last such case was *OEA v. Roberts*, 301 Or 228, 231, 721 P2d 833 (1986), which predated *Foster*. Justice Unis' citation of *Newbry* with approval in *Norblad* was in concurrence. This court has cited *Newbry* with approval twice since *Foster* was decided, once *en banc*, as discussed immediately below. *See Beat v. City of Gresham*, 166 Or App 528, 998 P2d 237 (2000); *Boytano* v. *Fritz*, 131 Or App 466, 473, 886 P2d 31 (1994) (en banc), *aff'd*, 321 Or 498, 901 P2d 835 (1995). But no Oregon appellate court has, since *Foster*, cited *Newbry* with approval for its central holding—pre-election separate-vote challenges are not justiciable.

The Court of Appeals has interpreted *Foster* twice, once sitting *en banc* in *Boytano*. *See Boytano* v. *Fritz,* 131 Or App 466,469-70, 886 P2d 31 (1994) (en banc), *aff'd,* 321 Or 498, 901 P2d 835 (1995). There the plaintiff sought to enjoin a local election official from placing an initiative on the ballot. She challenged the measure on two grounds. First, she asserted that the measure would be invalid if adopted, because it would restrict certain constitutional rights and unduly burden the citizens' right of initiative in the future. Citing *Foster,* the court ruled those challenges nonjusticiable. *See Boytano,* 131 Or App at 470. But the plaintiff also argued that the measure should not be put on the ballot because it was not "municipal" in nature, a requirement for local initiatives under Article IV, section 1(5), of the Oregon Constitution. This court ruled that under *Foster* "those are precisely the sort of arguments that are the proper subject of our pre-enactment review." *See id.* Here, the separate-vote requirement of Article XVII, section 1, is functionally equivalent to the "municipal" requirement of Article IV, section 1(5). As noted above, the Oregon Supreme Court affirmed the decision of the Court of Appeals and reaffirmed the distinction drawn in *Foster*. *See Boytano,* 321 Or at 501-02.

In *Seal v. City ofGresham,* 166 Or App 528, 998 P2d 237 (2000), the plaintiff had argued that under *Foster,* procedural challenges could *only* be brought pre-election. *See Beal,* 166 Or App at 533. In rejecting that argument, this court noted that before the 1986 decision in *OEA* v. *Roberts* the general rule was that no pre-election challenge could be made to proposed ballot measures.

See id[5] The court noted that the general rule applied regardless of whether the alleged constitutional defect in the proposed measure was substantive or formal, citing *Johnson* and *Newbry. See id.* But, said the court, there were exceptions that were carved out beginning in 1986 with the *Roberts* decision. *See id.* at 533-34 & n. 3. It explained that those exceptions were reformulated by *Foster* into a distinction based on the nature of the challenge: Although ordinarily pre-election constitutional challenges are not justiciable, "Oregon courts 'will prevent a measure from being placed on the ballot if the measure is legally insufficient to qualify for that ballot.'" *Id.* at 534 (quoting *Foster).*

Although this court in *Beat* did not explain what would qualify as "legal insufficiency," it did say that legal insufficiency includes more than just an insufficient number of signatures. *See id.* In *State ex rel. Paulus* v. *Fidanque,* 297 Or 711, 688 P2d 1303 (1984), the court noted that approval of a ballot measure is conditioned not only on there being the required number of signatures on the petitions, "but also upon determination that the use of the initiative power in each case is authorized by the Constitution." *State ex rel. Fidanque,* 297 Or at 715 n. 5. That suggests that a measure is legally insufficient—and therefore challengeable pre-election—if it fails to meet the formal requirements for initiated measures. Properly understood then, a measure is "legally insufficient to qualify for [the] ballot" if it fails to meet the formal or procedural requirements for placing it on the

[5] In fact, as discussed above, those exceptions predate *OEA v. Roberts,* a fact recognized by the Oregon Supreme Court in *Foster*. *See Foster,* 309 Or at 469-70.

ballot. On the other hand, a proposed measure that would violate a substantive provision of the constitution—if passed—is not by that fact alone "legally insufficient to qualify for [the] ballot" and may not be the subject of a pre-election challenge.

III. Separate-vote challenges fall within the exception, not the general rule, and are therefore justiciable pre-election.

Applying those principles here, pre-election separate-vote challenges are justiciable. Article XVII, section 1, mandates that measures be submitted to the voters so that each amendment can be voted on separately. That is a formal requirement of legal sufficiency to qualify a measure for the ballot. *See League of Oregon Cities,* 334 Or at 656 n. 11 (including separate-vote requirement among those termed "form-of-adoption" requirements); *Armatta v. Kitzhaber,* 327 Or 250, 276, 959 P2d 49 (1998) (separate-vote requirement "focuses on the form of submission of an amendment"). In that respect, it is like the formal requirements ruled justiciable pre-election in *OEA* v. *Roberts* (single-subject requirement of Article IV, section l(2)(d)) and *Foster* and *Boytano* (requirement that local initiative be "municipal" under Article IV, section 1(5)). Reviewing a proposed measure under the separate-vote requirement does not require the court to "inquire into the substantive validity of a measure" and is, therefore, appropriate pre-election under the *Foster* analysis. *See Foster,* 309 Or at 469.

IV. The Secretary of State's pre-election duty to determine the formal and procedural sufficiency of a ballot measure implies that the determination may be challenged pre-election.

The rulings in *Kozer* and *Newbry* were based on the assumption that the Secretary of State's obligation to put an initiated measure on the ballot was a purely ministerial act. The Secretary of State's responsibility in scrutinizing the proposed measure was viewed as limited to counting the signatures and ensuring compliance with the "statutory directions entitling it to be filed." His lack of authority to consider constitutional defects in the measure was a basis for the court's ruling in each case that no pre-election challenge could be made. *See Newbry*, 189 Or at 696-97; *Kozer,* 126 Or at 647-48.

More recent case law makes clear that the Secretary of State's role in reviewing proposed measures is more extensive than suggested in *Newbry* and *Kozer*. More importantly, that case law establishes that his or her decisions regarding the procedural and formal sufficiency of a measure are reviewable pre-election. *See State ex rel Fidanque,* 297 Or at 715-16 n. 5:

> Approval by the Secretary of State is conditioned not only upon verification of the required number of sponsor signatures, but also upon determination that the use of the initiative power in each case is authorized by the Constitution. Once this initial determination is made, that decision is then reviewable by the courts.

See also Boytano, 321 Or at 502-03 (same, quoting *State ex rel. Fidanque* with approval); *OEA v. Roberts*, 301 Or at 230-31 (Secretary of State must determine a measure's compliance with the single-subject requirement of Or Const, Art IV, § l(2)(d)). *Cf.* ORS 246.910 (any person adversely affected by the action or

inaction of the Secretary of State with respect to a ballot measure may challenge that action or inaction in circuit court).

Those more recent authorities demonstrate that one of the underpinnings of the Oregon Supreme Court's categorical statements in *Kozer* and *Newbry* is no longer sound. The Secretary of State's role in approving measures for the ballot is not merely ministerial. The more recent cases, therefore, support the *Foster* distinction: Proposed ballot measures may be reviewed pre-election for formal and procedural sufficiency, first by the Secretary of State, then by the courts upon an appropriate challenge. That includes separate-vote challenges.

V. Oregon appellate courts have repeatedly assumed without deciding that pre-election form-of-adoption challenges are justiciable.

In at least four modern cases, Oregon appellate courts have entertained pre-election challenges akin to that here, including two separate-vote cases. *See Ellis v. Roberts*, 302 Or at 6 (single-subject requirement of Article IV, section l(2)(d)); *Kerr v. Bradbury*, 193 Or App 304, 89 P3d 1227 (full-text requirement of Article IV, section l(2)(d)), *rev. allowed,* 337 Or 282 (2004); *Dale v. Keisling,* 167 Or App 394, 999 P2d 1229 (2000) (separate-vote requirement of Article XVII, section 1); *Sager v. Keisling,* 167 Or App 405, 999 P2d 1235 (2000) (same). In none of those cases did the court suggest a justiciability problem; each case is silent on the issue. As this court's request for supplemental briefing here illustrates, Oregon appellate courts raise justiciability issues *sua sponte* where appropriate. *See also, e.g., Barcik v. Kubiaczyk,* 321 Or 174, 186, 895 P2d 765 (1995) (court cannot decide nonjusticiable controversies even when the parties

agree that the controversy is justiciable). Oregon appellate courts have assumed—without explicitly deciding—that separate-vote challenges, single-subject challenges, and full-text challenges are all justiciable. That assumption is consistent with the distinction drawn in *Foster*.

CONCLUSION

None of the case law discussed above compels a result on the justiciability question posed by the court, The central question is whether the core holding of *Newbry* has survived *Foster*. The above analysis suggests that it has not. Although *Newbry* has never been explicitly overruled, its central holding was undermined by *Foster*. There the Oregon Supreme Court established the distinction between substantive challenges (not justiciable pre-election) and formal or procedural challenges based on legal sufficiency (justiciable pre-election). The separate-vote requirement is of the latter type. For the reasons stated above, the court should rule that pre-election separate-vote challenges are justiciable.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Respondent's Supplemental Memorandum on Justiciability to be filed with the State Court Administrator, Records Section, at 1163 State Street, Salem, Oregon 97301-2563, on January 30, 2006.

I further certify that I directed the Respondent's Supplemental Memorandum on Justiciability to be served upon Charles F. Hinkle and Scott J. Kaplan, attorneys for appellants, and Daniel W. Meek, attorney for defendant-intervenor-respondent David Delk, on January 30, 2006, by mailing two copies, with postage prepaid, in an envelope addressed to:

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