hIN THE SUPREME COURT 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

CA A127935

SC S53693

ANSWERING BRIEF ON REVIEW BY DAVID DELK (DEFENDANT-INTERVENOR-RESPONDENT)

Petition for Review of the Decision of the Court of Appeals on Appeal from a Judgment of the Circuit Court for Marion County Honorable Claudia M. Burton, Judge

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Before: Haselton, P.J., Armstrong and Rosenblum, J.

(continued ...)

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I. INITIATIVE PETITION 8 (2006) AND OTHER "SUBSTANCE PLUS SUPERMAJORITY" MEASURES DO NOT VIOLATE ARTICLE XVII, SECTION 1, OF THE OREGON CONSTITUTION.

As stated in the Opening Brief on Review by David Delk [hereinafter "Opening Brief of Delk"], pp. 23-31, our quick survey of the Oregon Constitution located 4 instances in just the past 10 years of Oregon voters approving amendments, offered by legislative referral or by initiative, which combine both new substantive provisions and two new supermajority voting requirements imposed on the Legislative Assembly:

1. Measure 86 (2000): the income tax "kicker" (legislative referral);

2. Measure 19 (2002): dedication of additional lottery funds to education (legislative referral);

3. Measure 66 (1998): dedicates some lottery funding to parks, beaches; habitat, watershed (initiative);

4. Measure 30 (1996): state must pay local governments costs of state-mandated programs (legislative referral).[1]

Measure 30 (1996) has also been readopted as Measure 84 (2000), which adds a fifth instance of a "substance plus supermajority" amendment to the Oregon Constitution in the past decade. The Explanatory Statement for Measure 30 stated:

> Measure 30 amends the Oregon Constitution to require state financing of state programs imposed on local governments after January 1, 1997. * * *
>
> The state is required to pay the usual and reasonable costs of such programs and costs of the state's increasing the level of services under existing programs after January 1, 1997.
>
> * * *

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1. The Merits Brief of Respondents on Review [hereinafter "Plaintiffs' Opening Brief"] does not address any of these provisions. The Amici brief addresses only Measure 86 (2000) and Measure 19 (2002).

> Measure 30 requires that at least 18 of the 30 state senators and 36 of the 60 state representatives approve any bill that reduces the amount of money that is distributed to local governments from proceeds of a specific state tax.
>
> Measure 30 does not apply to any of the following:
>
> * Any law approved by at least 60 percent of the members of each house of the legislature.
>
> * Requirements imposed by state or federal courts.
>
> * Laws enacted or approved through the initiative or referendum process.
>
> * * *
>
> Measure 30 will be repealed June 30, 2001, unless the voters at the 2000 General Election vote to keep the measure in effect.

The Legislative Argument in Support of Measure 30 stated:

> As an added safeguard for local governments, Measure 30 requires 60 percent of each house of the legislature to approve any bill that reduces the amount of money that is distributed to local governments from the proceeds of a specific state tax, such as the cigarette tax.
>
> In addition, the measure does not apply to laws adopted by the people by initiative.
>
> * * *
>
> This measure reduces the power of state government, allows local governments to set their own budgetary priorities and grants a greater share of fiscal control to local voters.

The Legislative Argument told voters that it was a good idea to **protect local government from the Legislature itself**, by including the two supermajority voting requirements.

Obviously, Measure 30 (1996) added to the Oregon Constitution both new substantive provisions and two new supermajority voting requirements for the Legislative Assembly. Also clear is that Measure 30 allowed the people using the initiative process to adopt state-mandated programs without providing state funds for the costs imposed on local governments. Thus, Measure 30 (1996) is a very close analog to IP 8, as it allowed the people using the

initiative process to adopt laws that would expressly require a supermajority in the Legislative Assembly to adopt.

Measure 30 (1996) proved so popular that Oregon voters in 2000, by a "yes" vote of 85%, adopted Measure 84 (2000), again offered to them by legislative referral. This measure permanently re-adopted the provisions of Measure 30 (1996). According to the Measure 84 (2000) Explanatory Statement:

> Section 15, Article XI of the Oregon Constitution, requires the state to pay for services that the state requires local governments to provide. * * * Ballot Measure 84 keeps section 15 in effect.
>
> * * *
>
> Section 15 does not apply to:
>
> (1) A law approved by at least 60 percent of the members of each house of the legislature;
>
> (2) A service required by a state or federal court;
>
> (3) A law enacted or approved through an initiative or referendum;

The Explanatory Statement also noted:

> Section 15 requires that at least 18 of the 30 state Senators and 36 of the 60 state Representatives approve any bill that reduces the money that the state distributes to local governments from the proceeds of a specific state tax.

So, Measure 84 (2000) also adopted substantive provisions and two separate supermajority voting requirements for the Legislative Assembly.

These "substance plus supermajority" measures for amendments to the Oregon Constitution are not unusual, as shown in the additional examples that were adopted in 1998, 2000, and 2002, as well as the example of Measure 48 on the November 2006 ballot. Opening Brief of Delk, pp. 23-31. Also well-known are amendments that adopt substantive provisions, coupled with new double-majority election voting requirements for certain types of measures, such as Measure 47 (1996) and Measure 50. None of these measures has been

struck down, or even been challenged, based on the combination of substantive provisions and imposition of supermajority or double-majority voting requirement. All will fail to withstand post-election challenge, should this Court adopt the reasoning of the Plaintiffs and the Court of Appeals.

Of the 5 "substance plus supermajority" measures adopted by Oregon voters since 1996, 4 have been legislative referrals (only Measure 66 was an initiative).[2] It would be hard to find better evidence of legislative interpretation of Article XVII, section 1, than this continuing practice, by the Legislature itself, of combining into one measure substantive provisions plus supermajority voting requirements--to be imposed upon the Legislature but not on the people using the initiative process. This Court accords respectful consideration to the constitutional interpretations of the Legislature.

> Of course, the uniform legislative interpretation or application of indefinite constitutional provisions of long standing is entitled to serious consideration by the courts, though it is not binding upon them. ***Hawley v. Anderson***, 99 Or 191, 190 P 1097, 195 P 358; ***Walker v. Polk County***, 110 Or 535, 223 P 741.

State v. Kuhnhausen, 201 Or 478, 516-17, 272 P2d 225 (1954). The practice of placing such "substance plus supermajority" measures as initiatives on the statewide ballot has also required the cooperation of the Executive Branch in the form of the Secretary of State.

> In the constitutional relationships between the legislative and executive branches, a longstanding understanding and practice shared by both branches doubtless deserves respectful consideration, though it is not conclusive.

Lipscomb v. State By and Through State Bd. of Higher Educ., 305 Or 472, 479, 753 P2d 939 (1988).

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2. These measures were offered to, and accepted by, the voters both before and after issuance of the opinions in ***Armatta v. Kitzhaber,*** 327 Or 250, 959 P2d 49 (1998); ***Lehman v. Bradbury***, 333 Or 231, 37 P3d 989 (2002); ***Swett v. Bradbury***, 333 Or 597, 43 P3d 1094 (2002); and ***League of Oregon Cities v. Oregon***, 334 Or 645, 56 P3d 892 (2002). Surely the Legislature was aware of these decisions.

In these "substance plus supermajority" measures referred to voters by the Legislature, the Legislature itself has recognized the need to protect the substantive provisions from later impairment by the Legislature. This need is obvious for adopting limits on political contributions or expenditures. Those who will be serving in the Legislature in 2007 will have been elected under Oregon's current system of no limits on political contributions, which has resulted in a very large increase in the cost of running for state or local offices in Oregon since 1996.[3] As they have succeeded under the "no limits" system, they naturally may be hostile to the statutory limits that would be imposed by voter adoption of Measure 47 and should be expected to try to increase or even repeal those limits, as did the legislatures in Colorado, Massachusetts, Ohio, and Missouri.[4] Providing supermajority protection for substantive change to the Oregon Constitution is thus a technique that is well-known and regularly used by the Legislature itself, before and after ***Armatta***.

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3. The Institute on Money in State Politics reports total spending by Oregon candidates for state offices of $4.2 million in the 1996 elections and $42 million in the 2002 elections, which included $14.9 million spent by candidates for Governor. Without a race for Governor in 2004, the amount spent on candidates for state offices was $29 million. See http://www.followthemoney.org/database/state_overview.phtml?si=200437. [This data is not available on any site maintained by government in Oregon.] Delk requests judicial notice that significant money is contributed and spent on candidate campaigns for state offices in Oregon.

4. The Opening Brief of Delk (p. 16) provided the recent examples of Colorado, Massachusetts, and Ohio, where the legislatures repealed voter-initiated campaign finance reform laws or very significantly increased limits on contributions. Delk also briefly mentioned Missouri events, which are described in greater detail in the KANSAS CITY STAR article of May 12, 2006, reproduced in the Appendix to this Answering Brief of Delk. The vote to "repeal all limits on campaign contributions" in the Missouri House was 88-67. Delk requests judicial notice of this fact. The Missouri vote was a simple majority but not the 3/4 supermajority required under IP 8.

A. THE COURT OF APPEALS OPINION RELIES ON A RATIONALE NOT PRESENTED BY THE PARTIES: MAINTAINING A "BALANCE OF POWER" BETWEEN THE LEGISLATIVE ASSEMBLY AND THE PEOPLE USING THE INITIATIVE PROCESS.

Plaintiffs' Opening Brief does not make the "balance of power" argument relied on by the Court of Appeals, nor has a "balance of power" analysis been articulated by this Court in its constitutional jurisprudence under Article XVII, section 1.

Amici's arguments entirely miss the point of the separate-vote requirement. The question is whether IP 8 constitutes more than one unrelated amendment to the Oregon Constitution, not whether IP 8 offends a hypothetical "balance of power" between legislative bodies and the people using the initiative process. This Court has never held that the separate-vote requirement is violated when a measure amends one part of the Oregon Constitution and then amends a hypothetical "meta-constitution" consisting of concepts that are not stated in the Oregon Constitution itself.[5]

Under the Oregon Constitution, all power ultimately rests with the people. Only the people can amend the Oregon Constitution. The Legislature can merely suggest amendments to the people. Thus, IP 8 does not reduce the power of legislative bodies. It merely shares an additional part of the heretofore reserved power of the people with the Legislative Assembly.

Without the people approving an amendment to the Oregon Constitution, all parties agree that the Legislative Assembly does not presently have the power to "enact and amend

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5. Amici (p. 7) disavows making any argument that IP 8 amends the Oregon Constitution by imposing a supermajority voting requirement on the Legislature (which is Plaintiffs' only source of the alleged multiple amendment):

> The key change wrought by Initiative Petition #8 is not the addition of a supermajority requirement but, as the Court of Appeals noted, 205 Or App at 309, and as explained at pages 4 to 5 of this Brief, the reallocation of legislative power between the people and their elected representatives.

laws to prohibit or limit contributions and expenditures * * * to influence the outcome of any election." It is clear that the people do have the power to enact and amend such laws, by using the initiative to amend the Oregon Constitution and using either another amendment or a statute to specify the content of statutory laws. If IP 8 changes some balance of legislative power, it increases the power of the Legislature, not the other way around.

The "balance" arguments of Amici (and in the Court of Appeals opinion) are based on a false dichotomy which assumes competing camps of republican legislative "power" and direct democratic legislative "power." It further assumes that courts can interfere with these essential political determinations. There is no recognized meta-constitutional concept known as a "balance of legislative power" between state electors and state-level elected representatives or between local electors and local elected representatives. All state legislative power derives from the citizens. No legislative body has a federal or state constitutional "right" to always exercise some specific quantum of power. Nor does a local governing body have such a right, although the sovereignty of the states themselves is guaranteed to the people by the U.S. Constitution.[6] It is also a serious question whether Courts should abstain under the "political question doctrine" from deciding challenges based on respective allocations of sovereign powers.[7]

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6. These concepts are forwarded in arguments that the Oregon initiative system or a specific measure violates the Republican Form of Government Guarantee in the U.S. Constitution. In this case, Plaintiffs affirmatively withdrew that claim in the trial court.

7. L. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARVLREV 1, 6-10 (1959) (court should invoke doctrine when constitution has committed decision to another branch); J. Choper, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 263 (1980) (courts should not decide constitutional questions concerning the respective powers of the legislature and the executive vis-a-vis one another).

There is no legislative power "pie" to divide or balance. In ***Kadderly v. City of Portland***, 44 Or 118, 74 P 710 (1903), this Court, when first construing Article IV, explained that legislative power is indivisible:

> No particular style of government is designated in the [federal] Constitution as republican, nor is its exact form in any way prescribed. A republican form of government is a government administered by representatives chosen or appointed by the people or by their authority. Mr. Madison says it is "a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior." THE FEDERALIST, 302. * * *. **Now, the initiative and referendum amendment does not abolish or destroy the republican form of government, or substitute another in its place. The representative character of the government still remains. The people have simply reserved to themselves a larger share of legislative power but they have not overthrown the republican form of the government, or substituted another in its place. The government is still divided into the legislative, executive, and judicial departments, the duties of which are discharged by representatives selected by the people. Under this amendment, it is true, the people may exercise a legislative power, and may, in effect, veto or defeat bills passed and approved by the Legislature and the Governor; but the legislative and executive departments are not destroyed, nor are their powers or authority materially curtailed.**

Kadderly, 44 Or at 144-45 (emphasis added). Later decisions have concluded that Guarantee Clause challenges are not justiciable [***State ex rel. v. Hutchison v. Sawyer***, 324 Or 597, 618, 932 P2d 1145 (1997)], but this Court has never altered its ***Kadderly*** analysis of the unitary source of state legislative power.[8] Nor has it undermined or reconsidered its rationale that the exercise of the people's legislative power--whether direct or indirect--is an elastic concept, not a "balance" with some quantum assured the legislature compared to the people.

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8. To the extent that the "balance" argument relies upon some "balance" with a republican form of government assured by the Guarantee Clause, it is also nonjusticiable. To the extent that the "balance" argument relies upon the meta-constitutional claim of "balance" in the Oregon Constitution, ***Kadderly*** is on point in its description of the unitary source of legislative power.

Amici's "balance" of power argument, if adopted, would amount to a new interpretation of Article IV and would limit the ability of the citizens to share their completely reserved legislative power, contrary to over 100 years of consistent judicial interpretation.

B. IP 8 DOES NOT AMEND ANY CONSTITUTIONAL BALANCE BETWEEN THE LAWMAKING AUTHORITY OF LOCAL GOVERNING BODIES AND LOCAL VOTERS.

The Amici Brief, p. 4, argues that IP 8 would alter the "shared allocation of local legislative power" by "granting local voters and not local governing bodies the authority to prohibit and limit campaign contributions and expenditures." This statement is not consistent with Oregon constitutional jurisprudence.[9]

Amici (p. 4) misstate the context of the dicta in ***Allison v. Washington County***, 24 Or App 571, 581 (1976), that "[u]nder the Oregon initiative and referendum system, the citizens and the legislative body have the same legislative authority." In support of this statement in ***Allison***, the Court of Appeals (at notes 13 and 16) relies upon ***Kadderly*** and its progeny. These cases construe the source of legislative power for citizens and legislative bodies as the "same", but do not suggest that the power must be divided into "same" (meaning equal) portions. The cases relied upon by ***Allison*** are not concerned with "balance" *between* the republican form of legislation *and* direct democracy (at the state or local levels). In fact, ***Kadderly***, *supra*, dismisses this Manachean concept of legislative power (fundamental to the "balance" argument) as both meaningless and irrelevant, since *all* legislative power derives directly or indirectly from the same source--the citizens.

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9. More accurately, our state constitution (unlike the federal) does not "grant" powers but instead limits legislative power. ***Straw v. Harris***, 54 Or 424, 428, 103 P 777 (1909). In matters where the exercise of legislative power is presently constitutionally limited, a change which loosens a limitation is not a "grant," nor is there any requirement to loosen limitations in some sort of tit-for-tat sequence.

There is nothing in the Oregon Constitution that requires that local voters and local legislative bodies have the same quantum of legislative power. This is obvious from the fact that local legislative bodies cannot impose tax increases, without voter approval. Local voters already have superior legislative power than do local legislatures.

Amici (p. 4) next argue that IP 8 would "alter the constitutional hierarchy of lawmaking authority in which the Legislative Assembly and the voters of the state outrank local governments," because IP 8 would supposedly shield locally initiated campaign finance ordinances from both initiative and state legislative referrals. The flaws in this argument are too numerous to fully discuss.

First, the overarching "constitutional hierarchy" is established by the federal constitution, which IP 8 cannot alter. Thus, local governments cannot "trump" a state enactment without running afoul of the federal constitution. "The powers reserved to the state by the federal Constitution do not permit of the organization of independent sovereignties." ***City of Portland v. Pacific Telephone & Telegraph Co.***, 5 F Supp 79, 81 (1933). Well established principles of constitutional jurisprudence announced by this Court provide that this Court must seek to avoid an unconstitutional interpretation, especially where the supposed unconstitutionality is (as Amici admit) is unclear from the text reviewed.

In ***Straw v. Harris***, 54 Or 424, 436, 103 P 777, 782 (1909) (discussing the powers delegated to municipalities under the Home Rule Amendment) stated:

> Whatever may be the literal import of the amendments it cannot be held that the state has surrendered its sovereignty to the municipalities to the extent that it must be deemed to have perpetually lost control over them. This no state can do. The logical sequence of a judicial interpretation to such effect would amount to a recognition of a state's independent right of dissolution. It would but lead to sovereigntial suicide. It would result in the creation of states within the state, and

> eventually in the surrender of all state sovereignty--all of which is expressly inhibited by article 4, § 3, of our national Constitution.[10]

Second, as noted in ***Straw v. Harris***, local governments and local electors acting under Article IV are exercising the plenary legislative power of the state's citizens only through delegation. In ***Portland Railway, Light and Power Co. v. City of Portland***, (DC Or) 210 F 667, 671 (1913), Judge Robert S. Bean[11] explained:

> It is true that under the Oregon system the legal voters of every city or town are given power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the state. But this does not authorize the people of a city to amend its charter so as to confer upon the municipality powers beyond what are purely municipal or inconsistent with a general law of the state constitutionally enacted.

There is nothing in the language of IP 8 that interferes in any way with the power of either the citizens voting state-wide or the state legislature to "pre-empt" voter-initiated local measures which are substantively inconsistent with a state policy on political contributions.

The primacy of state-wide legislation to supersede local laws was firmly settled in ***State ex rel. v. Port of Astoria***, 79 Or 1, 154 P 399 (1916); ***Rose v. Port of Portland***, 82 Or 541, 162 P 498 (1917); and ***Lovejoy v. Portland***, 95 Or 459, 188 P 207 (1917). It is now conclusively settled that a statute of general application supersedes the provision of any charter or any ordinance in conflict with the general statute (regardless of the whether initiated or passed through ordinance). In ***Rose***, a unanimous court reasoned:

> The legislature has the right to pass a general law concerning municipalities, cities, and towns; the right is contained in the Constitution; and therefore, when

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10. "By granting and reserving to the people of municipalities the power to enact and amend their charters and adopt local or special laws, the state has not surrendered her sovereignty to the municipalities." ***Coleman v. City of La Grande***, 73 Or 521, 525, 144 P 468, 470 (1914).

11. Judge Bean was a former Oregon Supreme Justice and Chief Justice at the time of argument in ***Straw v. Harris***.

> the legal voters of a city or town enact or amend a charter, they do so subject to the right of the Legislature to pass a general law because their right to enact or amend their charter must be exercised "subject to the Constitution."

82 Or at 568. "[T]he power of the Legislature to enact a general law applicable alike to all cities is paramount and supreme over any conflicting charter provision or ordinance of any municipality, city, or town." ***Burton v. Gibbons***, 148 Or 370, 379, 36 P2d 786 (1934).

Nevertheless, should a local jurisdiction enact campaign money limits for some local office, it would be analyzed under the well-established criteria of ***City of La Grande v. PERB***, 281 Or 137, 576 P2d 1204 (1978).

> * * *[B]oth municipalities and the state legislature in many cases have enacted laws in pursuit of substantive objectives, each well within its respective authority, that were arguably inconsistent with one another. In such cases, the first inquiry must be whether the local rule in truth is incompatible with the legislative policy, either because both cannot operate concurrently or because the legislature meant its law to be exclusive. It is reasonable to interpret local enactments, if possible, to be intended to function consistently with state laws, and equally reasonable to assume that the legislature does not mean to displace local civil or administrative regulation of local conditions by a statewide law unless that intention is apparent. See, e. g., ***Terry v. City of Portland***, 204 Or 478, 269 P2d 544 (1954); ***City of Portland v. Duntley***, 185 Or 365, 203 P2d 640 (1949); ***City of Coos Bay v. Aerie No. 538***, 179 Or 83, 170 P2d 389 (1946); ***Lyons v. City of Portland***, 115 Or 533, 235 P 691 (1925). However, when a local enactment is found incompatible with a state law in an area of substantive policy, the state law will displace the local rule. See, e. g., ***Winters v. Bisaillon***, 152 Or 578, 54 P2d 1169 (1936), holding that the State Motor Vehicle Act displaced local speed limits and overruling a prior holding that city authority is paramount; ***Southern Pac. Co. v. Consolidated Freightways, Inc***., 203 Or 657, 281 P2d 693 (1955) (same as to trains); ***Lovejoy v. City of Portland***, 95 Or 459, 188 P 207 (1920) (licensing insurance agents); ***City of Woodburn v. Public Service Comm'n***, 82 Or 114, 161 P 391 (1916) (utility rates); ***City of Klamath Falls v. Oregon Liquor Control Comm'n***, 146 Or 83, 29 P2d 564 (1934) (liquor regulation); ***Fischer v. Miller***, 228 Or 54, 363 P2d.

281 Or at 147, 148.

Thus, IP 8 would allow a local ballot measure to adopt or amend limits on political contributions for local candidate races. It would not allow local legislatures do so directly but would not limit the authority of local legislatures, by majority vote, to refer such proposals to

local voters for approval. Thus, the system would be similar to that for the imposition or increase in local property taxes, which also requires a vote of the people.

C. IP 8 DOES NOT AMEND DORMANT ARTICLE II, SECTION 22.

Amici next argue that IP 8 might allow for passage of statutes inconsistent with the dormant, (federally) unconstitutional Article II, § 22.

First, IP 8 makes no change, directly or indirectly, to Article II, Section 22, whether or not the latter section is in effect. Obviously, IP 8 makes no effective change to a section of the Oregon Constitution that is not in effect anyway, due to decisions of the federal courts that the section violates the U.S. Constitution. Further, even if Article II, Section 22, were in effect, IP 8 would make no change to it, and Amici fail to identify any change it would make. Article II, Section 22, does not state that its limit on political contributions is the only limit that the people of Oregon are allowed to adopt. IP 8 authorizes the people using the initiative process and the Legislature to adopt and amend laws limiting political contributions and spending. How that amends Article II, Section 22, is a mystery, which remains on the books and remains not in effect, with or without enactment of IP 8.

Second, Amici's analogy to the term limits measure in ***Lehman v. Bradbury***, 333 Or 231, 37 P3d 989 (2002), is logically flawed. In ***Lehman***, it was the ballot measure at issue that proposed two changes, one of which (term limits on federal elected officials) was later ruled contrary to the U.S. Constitution. Here, in contrast, the invalid provision is not one proposed in the ballot measure but is an existing, invalid and unenforceable part of the Oregon Constitution.

Amici (p. 6) then cite cases for propositions they do not support. They claim that Article II, Section 22, remains in the constitution, available for later enforcement, but the case cited pertains to a statute, not to a part of the constitution. Amici (p. 7) claim that perhaps

Article II, Section 22, would be resurrected by a change in interpretation of the U.S. Constitution. They offer no basis for that prediction. And, even if that happened, they fail to explain how IP 8 amends Article II, Section 22.

Amici (p. 5) offers the incorrect theory that Initiative Petition 8 would allow voters "to change a constitutional provision by statute." That is not the case. IP 8 authorizes the people using the initiative process (or Legislative Assembly by 3/4 votes) to "enact and amend laws to prohibit or limit contributions and expenditures." IP 8 does not authorize the people using the initiative process, or the Legislative Assembly by 3/4 votes, to amend the Oregon Constitution in any way. Article II, Section 22 is part of the Oregon Constitution. IP 8 would have utterly no effect upon it.

Of course, the people using the initiative process could always amend or abolish Article II, Section 22, using their existing powers under Article IV. And the Legislative Assembly could always refer to the people a measure to amend or abolish Article II, Section 22. IP 8 affects neither of these powers.

D. AMICI'S SUPERMAJORITY ARGUMENTS ARE REFUTED.

We have discussed above the numerous "substance plus supermajority" measures adopted by Oregon voters since 1996. Under all possible interpretations of their terms, their imposition of supermajority voting requirements on the Legislative Assembly altered the "balance of power" between the Legislative Assembly and the people using the initiative process. But such alteration itself is not an amendment to the Constitution.

> Under this amendment, it is true, the people may exercise a legislative power, and may, in effect, veto or defeat bills passed and approved by the Legislature and the Governor; but the legislative and executive departments are not destroyed, nor are their powers or authority materially curtailed.

Kadderly, 44 Or at 145.

Measure 86 (2000), Measure 19 (2002), Measure 66 (1998), Measure 30 (1996), and Measure 84 (2000) all altered the hypothetical "balance of power" between the Legislative Assembly and the people using the initiative process at least as much, if not more, than would IP 8.

E. INITIATIVE PETITION 8 DOES NOT AMEND ARTICLE I, SECTION 25(1).

Plaintiffs argue that the Court of Appeals was correct in interpreting the word "necessary" in Article IV, Section 25(1) as the equivalent of "sufficient" and rejecting the Circuit Court's analysis, which recognized the difference. The Legislature seems to believe there is a difference, as above we show it has successfully referred to voters 4 amendments since 1996 that combine "substance plus supermajority" that would violate Article IV, Section 25(1), if indeed "necessary" were to mean "sufficient."

As shown in the Opening Brief of Delk (pp. 5-10), the ordinary meaning of "necessary" is not "sufficient," and the courts of Oregon and elsewhere have recognized the difference in thousands of cases. Additional such cases in Oregon include: ***State v. Hite***, 198 Or.App. 1, 107 P.3d 677 (2005); ***Hudson-Connor v. Putney***, 192 Or App 488, 86 P3d 106 (2004); ***Rice v. Oriental Fireworks Co.***, 75 Or.App. 627, 707 P.2d 1250 (1985); ***State ex rel. Leonard v. Hogan***, 32 Or.App. 89, 573 P.2d 328 (1978). A Westlaw search for "necessary but not sufficient" produces 833 reported cases in the United States.

As shown in the Opening Brief of Delk (p. 8), with or without the enactment of Measure 46, it remains true that simple majorities in both houses of the Legislature are necessary but not sufficient to enact limits on political campaign contributions. Thus, Measure 46 does not change or alter Article IV, Section 25(1), or its application.

II. A PRE-ELECTION CHALLENGE BASED UPON AN ALLEGED VIOLATION OF ARTICLE XVII, SECTION 1, IS NOT JUSTICIABLE.

Amici's argument, p. 1, is irrelevant to anything presented in the Delk Opening Brief. They are responding to a "standing" argument that Delk does not make in this Court.

The Amici Brief, p. 2, does draw out an implication of ***Oregon Education Association v. Roberts***, 301 Or 228, 721 P2d 833 (1986). As noted in the concurrence by Justice Unis in ***State ex rel Keisling v. Norblad***, 317 Or 615, 633-35, 860 P2d 241 (1995), about ***State ex rel. v. Newbry et al***, 189 Or 691, 222 P2d 737 (1950):

> Specifically, this court said that "[a]ny interference by the courts with the enactment of an initiative measure, where all statutory requirements had been complied with, would in itself be a violation of the constitutional separation of the powers of government." *Id*. at 697, 222 P2d 737. ***Newbry*** has not been modified by an amendment to Article XVII, section 1, nor has the legislature attempted to modify the holding in ***Newbry***. Moreover, this court has not overruled ***Newbry***. In fact, this court recently has recognized the validity of the basic doctrine stated in ***Newbry***. ***OEA v. Roberts***, 301 Or 228, 721 P2d 833 (1986).

Justice Unis then noted that this Court approved pre-enactment determination by the Secretary of State on whether a "proposed amendment" would violate the single subject requirement of Article IV, Section 1, but had never reviewed a pre-enactment determination by the Secretary of State on whether a proposed amendment would violate a requirement of Article XVII:

> In contrast to Article IV, section 1, at issue in ***Roberts***, Article XVII, section 1, has not been amended to contain language similar to that relied on by this court in ***Roberts***.

Norblad, 317 Or at 635.

Amici claims that the justiciability issue is settled by the fact that the Secretary of State in this case did make an administrative determination regarding Article XVII, section 1. But that does not answer ***Newbry***, which held that pre-enactment review by the courts for compliance with Article XVII would "be a violation of the constitutional separation of the powers of government." Amici does put into question, however, whether the Secretary of

State also exceeded his authority in performing pre-enactment review for compliance with Article XVII, section 1. Whether the Secretary of State has such authority remains an open question, as was noted in the Opening Brief of Delk (p. 33), citing and quoting ***League of Oregon Cities v. Oregon***, 334 Or 645, 656 n11, 56 P3d 892 (2002). Thus, addressing the claims of Plaintiffs here would require the Court to decide the question of the Secretary's authority, as it has been placed at issue in the form of the justiciability challenge presented to the Court of Appeals by Delk in January 2006.

Amici's argument further fails to address ***Newbry***, because the mere fact that the Secretary of State performed a review for compliance with Article XVII, section 1, does not resolve either (1) the Secretary's authority to do so or (2) the ***Newbry*** concern for **judicial** overstepping of the separation of powers in the form of "[a]ny interference by the courts."

III. A VOTER DOES NOT HAVE STANDING TO RAISE A SEPARATE-VOTE ARGUMENT IN COURT, WHEN NO SUCH ARGUMENT OR CLAIM WAS RAISED IN THE APPLICABLE ADMINISTRATIVE PROCEEDING.

Plaintiffs' only separate-vote challenge raised in court was that IP 8 would amend both Article I, Section 8, and Article IV, Section 25(1). This contention was never presented in the administrative proceeding conducted by the Secretary of State to make his determination on whether IP 8 complies with constitutional procedural requirements.

Plaintiffs (p. 7) refer to ***Ellis v. Roberts***, 302 Or 6, 725 P2d 886 (1986), but that case occurred prior to the Secretary of State's institution of the agency proceeding to consider "separate vote" challenges to filed prospective petitions.[12] One is not required to exhaust administrative remedies that do not exist, and in the 1980s such remedies did not exist.

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12. 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).

Plaintiffs (p. 8) claim there are no specific statutory exhaustion requirements. But the exhaustion requirement is one of general application and does not require a specific statute to be in effect. See Brief of Defendant-Intervenor-Respondent David Delk (June 16, 2005) filed in the Court of Appeals, pp. 4-13 and particularly 9-11.[13]

Regarding Amici's argument, the fact that the Secretary made an agency proceeding available does not alter the fact that the only claim presented in court by Plaintiffs (that IP 8 amends both Article I, Section 8, and Article IV, Section 25(1)) was never presented to the Secretary in the agency proceeding by anyone. In fact, it is because the agency proceeding **was** available that the exhaustion requirement applied.

> At a minimum, it "goes without saying that for an administrative remedy to be 'exhaustible,' it must be available."

Taylor v. Board of Parole, 200 Or App 514, 520, 115 P3d 256 (2005) (quoting ***Fifth Avenue Corp. v. Washington Co***., 282 Or 591, 618, 581 P2d 50 (1978).

IV. THE COURT SHOULD ALLOW IP 8 ON THE BALLOT OR PROVIDE OTHER APPROPRIATE REMEDY.

IP 8 does not transgress Article XVII, section 1, and thus should proceed to the ballot. If the Court finds otherwise, however, the question of appropriate remedy arises. Even when proposed measures have included totally unrelated amendments, courts elsewhere have ordered the measures bifurcated into their unrelated parts to be presented to voters.

In ***Californians for an Open Primary v. McPherson***, 38 Cal4th 735, 134 P3d 299 (2006), the Court of Appeals had ordered the Secretary of State to split a proposed constitutional amendment into its two unrelated parts. The part that would enact an "open primary" was labeled Proposition 60, while the (unrelated) part providing for the refunding of

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13. This brief is considered the party's main briefs in the Supreme Court. ORAP 9.20(4).

previously-issued state bonds was labeled Proposition 60A. Both were offered to the voters as separate measures on the November 2004 ballot, and both passed. Later, the California Supreme Court decided in 2006 that the two parts could not meet even the "single subject" level of scrutiny. As the measures had already been approved by voters in judicially-imposed separate votes, the Court declined to "invalidate those constitutional amendments." 134 P3d at 331.

As noted earlier in briefing, the Chief Petitioners propose a system where the Legislative Assembly cannot easily amend limits on political contributions adopted by the people using the initiative process. Nevertheless, allowing voters to vote on a court-imposed bifurcation of IP 8 would be a form of remedy which would (1) eliminate the harm of which Plaintiffs complain, (2) not involve a disfavored total prior restraint on speech, and (3) be the course which assured judicial economy. This court would not be forced to address a number of settled and unsettled constitutional questions, and it would reduce the likelihood of post-election adjudication. The Court could order the Secretary of State to place on the ballot the following bifurcated measure:

1. MEASURE 46A.

   Be it enacted by the People of the State of Oregon, there is added an Article II, Section 24A, of the Constitution of Oregon, as follows:

   Notwithstanding any other provision of this Constitution, the people through the initiative process, or the Legislative Assembly, may enact and amend laws to prohibit or limit contributions and expenditures, of any type or description, to influence the outcome of any election.

2. MEASURE 46B.

   Be it enacted by the People of the State of Oregon, there is added an Article II, Section 24B, of the Constitution of Oregon, as follows:

   If the Legislative Assembly has authority under this Constitution to enact and amend laws to prohibit or limit contributions and

> **expenditures, of any type or description, to influence the outcome of any election, the Legislature may enact or amend such laws by a three-fourths vote of both Houses.**

This would enact the system offered by Measure 46, albeit with separate votes. As it would not make the effectiveness of either measure expressly contingent upon adoption of the other measure, it may pass muster under the Attorney General's current interpretation of the term "measure."

Bifurcating Measure 46 in this way would, unless both submeasures are enacted, have the unintended consequence of establishing a system of political campaign finance limits that are under the control of majorities in the Legislative Assembly, despite the conflict of interest described in earlier briefing.

V. CONCLUSION.

Although briefing in this case has proceeded without explicit challenge to the ***Armatta*** line of cases, the Court should also reconsider its ***Armatta*** path. ***Californians for an Open Primary v. McPherson***, 38 Cal4th 735, 134 P3d 299 (2006), presents an extensive review of judicial decisions applying the "separate vote" requirements in many states. The California Supreme Court reviewed ***Armatta*** and declined to accept it.

> And, significantly, for more than a century a clear majority of the nearly 30 other jurisdictions that have a separate-vote provision similar to ours have similarly construed their separate-vote provisions, upholding amendments against challenges so long as the measure's provisions are reasonably germane to a common theme, purpose, or subject. * * *
>
> The history of this [Oregon] case law and related matters has led one commentator to predict that under the strict ***Armatta*** test as applied in Oregon, most proposed constitutional amendments will fail. (Hoesly, *Reforming Direct Democracy: Lessons From Oregon* (2005) 93 CAL.L.REV. 1191, 1224.

Californians for an Open Primary, 134 P3d at 319, 323.

Dated: August 24, 2006

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I FILED the original and 12 copies and further that I served two true copies of the foregoing ANSWERING BRIEF ON REVIEW BY DAVID DELK (DEFENDANT-INTERVENOR-RESPONDENT) by first class mail to all parties listed below, deposited in the U.S. Postal Service at Portland, Oregon, with first class postage prepaid.

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