# IN 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**

## OPENING 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

---

Opinion Filed: April 26, 2006
Author of Opinion: Rosenblum, J.
Before: Haselton, P.J., Armstrong and Rosenblum, J.

---

(continued ...)

DANIEL W. MEEK
OSB No. 79124
10949 S.W. 4th Avenue
Portland, OR 97219
(503) 293-9021 voice
dan@meek.net

Attorney for Defendant-Intervenor-Respondent David Delk

HARDY MYERS
OSB No. 64077
Attorney General
MARY H. WILLIAMS
OSB No. 91124
Solicitor General
CHARLES FLETCHER
OSB No. 84218
Assistant Attorney General
Oregon Department of Justice
1162 Court Street N.E.
Suite 400
Salem, OR 97201-4096
502-378-4402

Attorneys for Defendant-Respondent Secretary of State Bill Bradbury

CHARLES HINKLE
OSB No. 71083
SCOTT KAPLAN
OSB No. 91335
Stoel, Rives
900 S.W. 5th Avenue #2600
Portland, OR 97204-1268
503-224-9266
cfhinkle@stoel.com
sjkaplan@stoel.com

Attorneys for Plaintiffs-Appellants

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**CONSTITUTION AND STATUTES**

## LEGAL QUESTIONS PRESENTED ON REVIEW

The legal questions and proposed rules of law are presented in outline format. Defendant-Intervenor-Respondent David Delk [hereinafter "Delk" or "Chief Petitioner"] adopts the first and second legal questions presented in the Petition for Review filed by Defendant Bradbury.[1]

### 1. DOES INITIATIVE PETITION 8 (2006) PROPOSE MORE THAN ONE SUBSTANTIVE CHANGE TO THE OREGON CONSTITUTION?

Delk adopts the position offered in the Petition for Review of Defendant Bradbury but offers different arguments, below.

### 2. IF INITIATIVE PETITION 8 (2006) PROPOSES MORE THAN ONE SUBSTANTIVE CHANGE TO THE OREGON CONSTITUTION, ARE THOSE CHANGES CLOSELY RELATED ENOUGH TO SATISFY THE SEPARATE-VOTE REQUIREMENT OF ARTICLE XVII, SECTION 1, OF THE OREGON CONSTITUTION?

Delk adopts the position offered in the Petition for Review of Defendant Bradbury but offers different arguments, below.

### 3. IS A PRE-ELECTION CHALLENGE BASED UPON AN ALLEGED VIOLATION OF ARTICLE XVII, SECTION 1, JUSTICIABLE?

The proposed rule of law is that a challenge based on Article XVII, section 1, prior to enactment of the initiative petition at issue, is not justiciable. While courts have jurisdiction to hear pre-enactment challenges that allege violations of Article IV, that jurisdiction is based upon a specific statute enacted in 1968, which does not apply to challenges based on alleged violation of Article XVII, section 1.

---

1. We refer to Delk and Defendant Bradbury together as "Defendants."

**4. DOES A VOTER HAVE STANDING TO RAISE A SEPARATE-VOTE CHALLENGE IN COURT, WHEN NO SUCH ARGUMENT WAS RAISED IN THE APPLICABLE ADMINISTRATIVE PROCEEDING?**

Plaintiffs' only separate-vote challenge raised in court was that Initiative Petition 8 [hereinafter "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 all constitutional procedural requirements. The proposed rule of law is that plaintiffs cannot bring such claims to court, if they failed to raise those claims in the agency proceeding. ***Ayres v. Board of Parole and Post-prison Supervision***, 194 Or App 429, 435, 97 P3d 1 (2004); ***Mullenaux v. Dept. of Revenue***, 293 Or 536, 539, 651 P2d 724 (1982).[2]

**NATURE OF THE ACTION OR PROCEEDING**

Chief Petitioners, including David Delk, in August 2004 filed IP 8 with the Secretary of State. After receiving comments and consulting with the Attorney General, the Secretary of State determined that IP 8 satisfied all of the constitutional procedural requirements for qualification to the ballot, should sufficient signatures be submitted.

Plaintiffs brought suit in Marion County Circuit Court, with various claims. Defendants prevailed on competing motions for summary judgment, after Delk overcome Plaintiffs' lengthy objections to his intervention. Plaintiffs appealed, and the Court of Appeals issued an opinion favoring Plaintiffs on April 26, 2006. This Court granted the Petitions for Review filed by the Secretary of State and by Delk.

---

2. This means that Plaintiffs forfeit this claim in their attempt to enjoin the Secretary of State from placing IP 8 on the ballot. This does not preclude any elector from making this claim in a post-enactment challenge to IP 8, if it is passed by the voters.

## ARGUMENTS CONCERNING THE LEGAL QUESTIONS

### I. INITIATIVE PETITION 8 (2006) DOES NOT PROPOSE MORE THAN ONE SUBSTANTIVE CHANGE TO THE OREGON CONSTITUTION.

IP 8 proposes a one-sentence change 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.**

The purpose of IP 8 is to allow legislative bodies to enact and amend limits on political contributions and expenditures in Oregon, overcoming ***Vannatta v. Keisling***, 324 Or 514, 931 P2d 770 (1997), which held that Article I, Section 8, does not allow a legislative body in Oregon to limit political campaign contributions or expenditures. *See id.*, 324 Or at 541, 931 P2d at 787.

#### A. THE COURT OF APPEALS OPINION RELIES ON A RATIONALE NOT PRESENTED BY THE PARTIES.

The Court of Appeals Opinion relies for its "closely related" determination under Article XVII, section 1, upon a rationale that was not made by any of the parties in court. Plaintiffs in court argued that IP 8 would implicitly amend both Article I, Section 8, and Article I, Section 25(1). They argued that these amendments were not closely related, because one deals with rights of free expression while the other deals with legislative voting requirements.

In contrast, the Court of Appeals adopted this rationale:

> We cannot say that the proposed change to Article IV, section 25--which would have the profound effect of shifting the balance of power from the legislature to the people, through the initiative process, in matters related to campaign finance--is closely related to the change carving out an exception to Article I, section 8, for laws that prohibit or limit contributions and expenditures

> to influence the outcome of an election. We therefore conclude that IP 8 violates the separate-vote requirement in Article XVII, section 1.

205 Or App at 309. No one argued in court that Article XVII, section 1, would be violated by a "shifting [of] the balance of power from the legislature to the people, through the initiative process, in matters related to campaign finance." The argument of Plaintiffs was that IP 8 amends both Article I, Section 8, and Article I, Section 25(1), because it changes the threshold for enacting bills in the Legislature (on this particular subject) from 50% to 75%. None of Plaintiffs' argument on the separate-vote requirement had anything to do with whether IP 8 authorized voters using the initiative process to enact or amend campaign finance reform laws, regardless of the majority or supermajority required for that. The Court of Appeals' rationale was not expressed by any of the parties in court. A search of the briefs shows the expression of no such rationale.[3]

---

3. We believe that the "shifting the balance of power" rationale came from the comments submitted by the future-Plaintiffs to the Secretary of State in the administrative process. When Plaintiffs filed in the Circuit Court, however, they dropped that argument and instead introduced the new argument in court that IP 8 violates the separate-vote requirement by implicitly amending Article IV, Section 25(1)--an argument they had not presented to the Secretary of State. Since the argument was not raised in court, Defendants did not have an opportunity to respond to that rationale in court, prior to now.

   The Amended Complaint filed by Plaintiffs on December 24, 2004, makes a "balance of power" contention only in support of its claim that IP 8 violates the Republican Form of Government Guarantee in Article IV, section 4, of the U.S. Constitution.

   > An amendment to the Oregon Constitution like that proposed by IP 8, which would reserve greater legislative power to the People by initiative than the Legislative Assembly would have, would reduce the Legislative Assembly to the status of a second-class partner in the process of enacting, amending and repealing laws. Such a system of government would violate the republican form of government guarantee in Article IV, section 4, of the U.S. Constitution.

(continued...)

Nor has a "balance of power" analysis been articulated by this Court in its constitutional jurisprudence under Article XVII, section 1.

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

The Circuit Court's opinion correctly interpreted Article I, Section 25(1), as meaning what it states:

> I agree with defendant and intervenor that such an interpretation cannot be squared with the plain language of Article IV, section 25. As amply demonstrated in intervenor's brief, "necessary" is not the same as "sufficient." The constitutional provision that a majority vote is necessary does not mean that a majority vote is sufficient. Passage of IP 8 does not change Article IV, section 25, because a majority vote will still be necessary to pass every bill. It simply will not be enough to pass campaign finance bills.

When Article I, Section 25(1), says "necessary," it must mean "necessary." This Court has determined that words in laws and constitutions are to be given their ordinary meanings. ***State v. Murray***, 340 Or 599, 604, 136 P3d 10 (2006); ***Ecumenical Ministries v. Oregon State Lottery Commission***, 318 Or 551, 560, 871 P2d 106 (1994);

> That inquiry necessarily involves an issue of statutory interpretation that invokes this court's familiar methodology of examining the words of a statute, read in relevant context, and, if no clear interpretation emerges from that exercise, resorting to extrinsic aids such as legislative history to determine the intent of the legislature. *See generally* ***PGE v. Bureau of Labor and Industries***, 317 Or 606, 610-12, 859 P2d 1143 (1993) (describing that methodology).

***State v. Murray***, 340 Or at 603.

The ordinary meaning of "necessary" is not "sufficient." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED (Merriam-Webster, 2002) defines "necessary" as:

---

3.(...continued)

> Amended Complaint, ¶ 8. Plaintiffs in Circuit Court almost immediately conceded that this claim was not justiciable and did not seek summary judgment upon it. Plaintiffs did not argue that the "shifting the balance of power" was an element of the Article XVII, section 1, challenge.

"that cannot be done without : that must be done or had : absolutely required : ESSENTIAL, INDISPENSABLE. Conversely, it defines "sufficient" as: marked by quantity, scope, power, or quality to meet with the demands, wants, or needs of a situation or of a proposed use or end. The Dictionary recognizes the difference between "necessary" and "sufficient" conditions in the definition of "condition":

> 1 a : something established or agreed upon as a requisite to the doing or taking effect of something else : STIPULATION, PROVISION
>
> b obsolete : an agreement determining one or more such prerequisites : COVENANT
>
> 2 : something that exists as an occasion of something else : a circumstance that is essential to the appearance or occurrence of something else : PREREQUISITE: as
> * * *
>
> (3) : a proposition having a relation to the validity of another such that (1) validity of the first is sufficient evidence that the second is valid or (2) the second can only be valid if the first is also valid -- called also respectively (1) sufficient condition, (2) necessary condition

It also defines "sufficient condition" as "a cause, ground, or condition such that if it be given the thing in question is assured." The satisfaction of a "necessary condition" does not assure the thing in question. It only makes it possible for the thing in question to occur.

A recent treatise on "The Concepts of Necessary and Sufficient Conditions" articulates the common sense knowledge of the difference between the concepts of "necessary" and "sufficient."[4]

> **Definition of "necessary condition"**
>
> Definition: A condition A is said to be necessary for a condition B, if (and only if) the falsity (/nonexistence /non-occurrence) [as the case may be] of A guarantees (or brings about) the falsity (/nonexistence /non-occurrence) of B.

---

4. Norman Swartz, Professor of Philosophy, Simon Fraser University, THE CONCEPTS OF NECESSARY AND SUFFICIENT CONDITIONS (1997) (available at http://www.sfu.ca/philosophy/swartz/conditions1.htm). This was cited in our memoranda to the Circuit Court.

* * *

But of course, as we well know, in general a necessary condition is not a sufficient condition. All sorts of conditions may be necessary for others, but do not - by themselves - suffice for, or guarantee, those others.

**Definition of "sufficient condition"**

Definition: A condition A is said to be sufficient for a condition B, if (and only if) the truth (/existence /occurrence) [as the case may be] of A guarantees (or brings about) the truth (/existence /occurrence) of B.

For example, while air is a necessary condition for human life, it is by no means a sufficient condition, i.e. it does not, by itself, i.e. alone, suffice for human life. While someone may have air to breathe, that person will still die if s/he lacks water (for a number of days), has taken poison, is exposed to extremes of cold or heat, etc. There are, in fact, a very great many conditions that are necessary for human life, and no one - or even just a few of them - will suffice for [or guarantee] human life.

Or, further, consider the property of having four sides. While having four sides is a necessary condition for something's being a square, that single condition is not, by itself, sufficient (to guarantee) something's being a square, i.e. some four-sided things (e.g. trapezoids) are not squares. There are several necessary conditions for something's being a square, and all of these must be satisfied for something's being a square:

* * *

Examples 8.1 - The first is a necessary, but not a sufficient, condition for the second.

* "Sam's being a male is a necessary, but not a sufficient condition, for being a father."

* "A table's having four sides is a necessary, but not a sufficient, condition for its being square."

* "Being more than 6 feet (183 centimeters) tall is a necessary, but not a sufficient condition for being 6 feet 3 inches (190.5 centimeters) tall."

* "Owning a 1996 Chevrolet Cavalier is a necessary, but not a sufficient condition, for owning a red, 6-cylinder, 1996 Chevrolet Cavalier."

* "Having a ticket in a lottery is a necessary, but not a sufficient condition, for winning that lottery."

Similarly, if Petition #8 is adopted, obtaining a majority vote in each House will be "necessary" for enactment of any statutory campaign contribution or expenditure prohibitions or limits, but such majority votes (over 50% but less than 75%) will not be "sufficient" to enact such statutes. Thus, IP 8 does not in any way, expressly or implicitly, amend Article IV, Section 25(1).

There are literally thousands of court cases recognizing the difference between "necessary" and "sufficient" conditions. See, e.g., ***Miller-El v. Cockrell***, 537 US 322, 349, 123 SCt 1029, 1046 (2003); ***State v. Gerrish***, 311 Or 506, 517, 815 P2d 1244 (1991); ***Morgan v. MacLaren School, Children's Services Division***, 23 Or App 546, 553, 543 P2d 304 (1975).

Plaintiffs entire argument regarding Article IV, Section 25(1) relies upon misstating a necessary condition as being as sufficient condition. If IP 8 is enacted, it will remain "necessary" for all bills in the Legislative Assembly to receive a majority vote in order to be enacted. A mere simple majority will not, however, be sufficient to enact or amend laws pertaining to limits on political campaign contributions.

IP 8 does not at all change Article IV, Section 25(1):

1. Without the enactment of Measure 46, simple majorities in both houses of the Legislature are necessary but not sufficient to enact limits on political campaign contributions.

   They are not sufficient, due to ***Vannatta***, which establishes that the Legislature cannot currently enact such limits at all.

2. With the enactment of Measure 46, simple majorities in both houses of the Legislature are necessary but not sufficient to enact limits on political campaign contributions.

   They are not sufficient, due to the provisions of Measure 46, which allows enactment of such limits only by 3/4 majorities of both houses.

Thus, 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, or its application.

But let us assume for a moment that "necessary" in Article I, Section 25(1), somehow does mean "sufficient." In that case, it is clear that IP 8 does not amend or affect Article I, Section 25(1), because that section of the Oregon Constitution must not currently apply to enactment or amendment of "laws to prohibit or limit contributions and expenditures, of any type or description, to influence the outcome of any election" [the language of IP 8]. Passage of such a law by simple majorities of the members of both the Senate and House is not today "sufficient" to enact or amend such laws, due to this Court's decision in ***Vannatta v. Keisling***, 324 Or 514, 931 P2d 770 (1997). Thus, IP 8 does not amend or even affect Article I, Section 25(1), because that section of the Oregon Constitution does not today apply to the subject matter of IP 8 (if, indeed "necessary" is interpreted to mean "sufficient").

The Court of Appeals opinion states:

> Second, it would change Article IV, section 25(1), by carving out an exception to the rule found in that section that the legislature may pass and amend legislation by a simple majority.

205 Or App at 306. But Article IV, Section 25(1) does not express a rule "that the legislature may pass and amend legislation by a simple majority." It states that simple majorities are necessary but does not state that simple majorities are sufficient.

The Court of Appeals then incorrectly construes Delk's argument about the applicability of Article IV, Section 25(1), to IP 8. Delk's argument was not that Article IV, Section 25(1), "applies only to that class of laws that the legislature had the power to enact at the time that section was drafted." 205 Or App at 306. Instead, Delk argued that, if "necessary" is

interpreted as meaning "sufficient," Article IV, Section 25(1), must not apply at all to laws limiting political contributions, because quite obviously simple majority votes of both houses are not sufficient to enact such laws, due to ***Vannatta***. This is yet another reason to give "necessary" its plain meaning and not to attempt to have it mean something different.

Further, as demonstrated below, we have located at least 4 previous amendments to the Oregon Constitution which have combined, in a single measure, both a substantive change and the imposition of a supermajority voting requirement upon the Legislature. If "necessary" means "sufficient," then those 4 other amendments are invalid, as also is Measure 48 on the November 2006 ballot (which also has substantive provisions and then a supermajority voting requirement for the Legislature).

### C. IF INITIATIVE PETITION 8 (2006) PROPOSES MORE THAN ONE SUBSTANTIVE CHANGE TO THE OREGON CONSTITUTION, THOSE CHANGES CLOSELY ARE RELATED.

#### 1. THE "BALANCE OF POWER" CONCLUSION.

As noted above, the Court of Appeals' rationale hinged upon its spontaneous finding that IP 8 "would have the profound effect of shifting the balance of power from the legislature to the people, through the initiative process, in matters related to campaign finance." 205 Or App 309. But Article XVII, section 1, does not prohibit or discuss allocations of the exercise of legislative power between direct and republican democratic action, which is dealt with in Article IV.

Further, whether IP 8 would have a "profound effect" was not an issue in the courts, as it was not asserted by Plaintiffs as any part of their rationale why IP 8 violates the separate-vote requirement. If the "profound effect" issue had been raised, we would have pointed out that, under IP 8, the Legislature can still, by simple majority vote of both houses, refer to

voters both constitutional amendments and statutes to alter laws pertaining to limits on political campaign contributions. The Court of Appeals elevated its description of a current balance to the status of an implied immutable constitutional provision.

Further, "shifting the balance of power from the legislature to the people, through the initiative process" is not a recognized ground for invalidating an initiative under ***Armatta v. Kitzhaber***, 327 Or 250, 959 P2d 49 (1998). The Court of Appeals opinion implies that the expected magnitude of the consequences of a change to the Oregon Constitution is somehow a factor to be considered, but this Court has not so held. The people enacting measures by popular vote are not disabled from making changes to the Oregon Constitution that will have significant consequences upon the structure and functioning of government in Oregon. After all, the initiative process itself was adopted by popular vote, thanks to a referral by the Legislature in 1902. Surely, the adoption of the initiative process constituted a far greater "shifting the balance of power" than does IP 8, yet it passed muster under Article XVII, section 1.[5] So did the following constitutional amendments to government structure or function adopted by popular vote:

| | |
|---|---|
| 1904 | nomination of candidates through direct primary elections |
| 1908 | allows recall of elected officials |
| 1908 | reorganizes state court system |
| 1908 | makes public officials subject to recall |
| 1910 | direct primary for nomination of President, etc. |
| 1910* | abolishes poll taxes |

5. In ***Armatta***, *supra*, this Court examined the history of the separate-vote requirement of Article XVII, section 1. concluding that the original 1859 Oregon Constitution included this requirement, applicable to legislative referrals of constitutional amendments to the voters. 327 Or at 259. The initiative and referendum process was adopted by means of legislative referral in 1902, so that referral itself was subject to the separate-vote requirement.

| | |
|---|---|
| 1912* | grants women the right to vote |
| 1914* | requires Oregon voters to be U.S. citizens |
| 1916 | allowing single item veto by Governor |
| 1926 | changes method for recalling public officials |
| 1927* | requires voters to register |
| 1930* | changes method for filling vacancies in Legislature |
| 1944* | allows Legislature to regulate forfeiture of voting privilege |
| 1946 | changes succession to Office of Governor |
| 1948 | changes qualifications for voters in school elections |
| 1950* | fixes compensation for Legislators |
| 1952 | changes qualifications for voters establishing a tax base |
| 1952* | fixes terms of Oregon Senators and Representatives |
| 1954 | subdivides counties for election state Legislators |
| 1954* | amends method for people to propose amendments to Constitution |
| 1956* | sets salaries of state officers |
| 1958 | establishes county home rule |
| 1958* | sets qualifications for persons to serve in Legislature |
| 1960* | authorizes Legislature to propose revised Oregon Constitution |
| 1960* | changes qualifications for voters |
| 1962* | changes salaries of state legislators |
| 1962 | creation of state court system |
| 1968* | changes requirements applicable to use of initiative and referendum |
| 1968 | authorizes removal of judges |
| 1972 | changes succession to Office of Governor |
| 1974* | opens all legislative deliberations to the public |
| 1974 | changes succession to Office of Governor |
| 1974* | revises qualifications to be Oregon voter |
| 1976* | allows Legislature to call special session |
| 1978 | sets initiative and referendum requirements in home rule counties |
| 1978* | sets open meeting rules for Legislature |

| | |
|---|---|
| 1978 | authorizes Senate confirmation of Governor's appointments |
| 1984 | changes requirements for recall of public officers |
| 1986* | changes verification of signatures on initiative and referendum petitions |
| 1986* | revises legislative district reapportionment procedures |
| 1986 | cuts off voter registration 20 days before election |
| 1988 | extends Governor's veto deadline after Legislature adjourns |
| 1994 | changes deadline for filling vacancies at general election |
| 1995* | requires legislators to live in their districts |
| 1996* | requires 3/5 vote of both houses of Legislature to pass revenue bills |

We have marked with asterisks those amendments that could be said to "shift the balance of power" between the Legislature and voters or the people using the initiative process, in one direction or the other. None of these measures have been invalidated under ***Armatta***.

### 2. THE ULTIMATE CONCLUSION REGARDING "CLOSELY RELATED."

Even if the "balance of power" were someone immune from amendment, the "shifting [of] the balance of power from the legislature to the people, through the initiative process, in matters related to campaign finance," 205 Or App at 309, is clearly closely related to Article I, Section 8, which this Court has found plays the central role in determining what limits on political contributions or expenditures are allowed in Oregon.

### 3. MISALLOCATION OF THE BURDEN OF PROOF ON THE "CLOSELY RELATED" QUESTION.

Further, the Court of Appeals put the burden of proof here on the wrong party. It stated,

> We cannot say that the proposed change to Article IV, section 25 * * * is closely related to the change carving out an exception to Article I, section 8 * * *."

The Secretary of State, upon advice of the Attorney General, found that, if IP 8 can be said to make multiple changes, then they are closely related. The Court of Appeals did not make the finding that the changes were **not** closely related. The plaintiffs should have the burden of proving that the initiative petition, accepted by the Secretary of State for qualification on the ballot (upon the advice of the Attorney General) presents changes that are not closely related. The Court of Appeals Opinion simply states that it could not reach a conclusion on that question. In the absence of such a conclusion, the Court should not have invalidated IP 8.

### D. THE COURT OF APPEALS' AND PLAINTIFFS' RATIONALES WOULD ALLOW ENACTMENT OF SWEEPING AMENDMENTS -- BUT NOT LESS SWEEPING ONES.

Under Plaintiffs' analysis, a much larger change than IP 8, regarding limits on political contributions, could be placed before voters, without being two amendments.

There were numerous public meetings, for several years, leading up to the submittal of IP 8 (2006) in August 2004. Some argued that, because existing members of the Legislature (elected under a regime of no limits on political contributions) would have a severe conflict of interest with a system of limits, the amendment should authorize only the people using the initiative process to adopt or amend limits on political contributions in Oregon. That concept was embodied in Petition 52 (2004), filed on May 26, 2003, which would have allowed only

the voters using the initiative process to enact or amend limits on political contributions.[6] It would not have authorized the Legislature to do so at all.

Clearly, this would have a more "profound effect of shifting the balance of power from the legislature to the people" than would IP 8. Yet, according to Plaintiffs' analysis in court, there would be no bar to this measure, as it would not even implicitly change Article IV, Section 25(1). Thus, Plaintiffs' approach stands ***Armatta*** on its head by allowing petitioners to present to voters large changes but not smaller (or lesser included) changes to the Oregon Constitution.

Such an amendment as Petition 52 (2004) would surely have changed the balance of power between the Legislature and the people even more than would IP 8, as **only** the people using the initiative process would have had any authority to enact or amend contributions limits under the earlier version. Under the Plaintiffs' analysis of Article XVII, section 1, however, such a larger shift in balance of power would not be two unrelated amendments, because it could not be said to in any way change or alter Article IV, Section 25(1).

In the meetings, others argued that the amendment should also authorize the Legislature to enact and amend laws limiting political contributions, without a supermajority requirement on such actions by the Legislature. The compromise was IP 8 (2006), which authorizes the people using the initiative process to adopt and amend laws limiting political contributions

---

6. Petition 52 (2004) read:

> Be it enacted by the People of the State of Oregon, Article I, Section 8, of the Constitution of Oregon, is amended by the addition of the following:
>
> > **Notwithstanding, the people are entitled to the conduct of elections free of the undue influence of monied interests, in accordance with laws enacted or amended through the initiative process to prohibit or limit contributions and expenditures, of any type or description, to influence the outcome of any election.**

and authorizes the Legislature also to do so, upon 3/4 votes of both houses. The need for this approach was the perceived severe conflict of interest that would likely cause the Legislature to use simple majority votes to repeal or alter meaningful limits on political contributions adopted through the initiative process. See Brief of Defendant-Intervenor-Respondent David Delk (June 16, 2005) to the Court of Appeals [hereinafter Delk Brief on Appeal], pp. 24-25.[7]

Petitioners and voters of Oregon are not disabled from amending their Constitution in effective ways. Allowing a simple majority of the Legislature, elected under a regime of no limits on political contributions, to change such limits enacted by initiative, is a recipe for futility. In addition to the examples of Massachusetts, Ohio, and Colorado, the Missouri Legislature in July 2006 repealed the limits on contributions that voters there enacted in 1994 by a margin of nearly 3-1.[8]

Avoiding conflict of interests among elected legislators is a touchstone of American constitutional government. From the time of the founders, the premise of the federal

---

7. The Delk Brief on Appeal (pp. 24-25 and attachments) documents that, in Massachusetts and Ohio, campaign finance reform statutory measures have subsequently been gutted by legislatures, acting by majority votes or voice votes but not by 3/4 vote of each house. In addition, after Colorado voters overwhelmingly adopted limits on political campaign contributions, the Colorado Legislature in 2000, while challenges to the 1996 measure were underway in federal court, raised the limits by a factor of 10 for most offices and more for others. That caused Colorado voters to enact a 12-page long amendment to the Colorado Constitution in 2002, again adopting the lower limits but placing them beyond the authority of the Legislature to change. See ***Citizens for Responsible Government State Political Action Committee v. Davidson***, 236 F3d 1174 (10th Cir 2000); ***Colorado Right to Life Committee, Inc. v. Davidson***, 395 F Supp 1001 (D Colo 2005) (appendix includes text of the long amendment).

   The group that filed IP 8 had previously filed IP 43 (2002) and IP 53 (2004), both of which took the Colorado approach of placing several pages of detailed limits in the Constitution. Out of deference to ***Armatta***, however, the group then decided for 2006 to pursue only a one-sentence amendment to the Oregon Constitution: IP 8 (2006).

8. The Associated Press reported on July 12, 2006: "People, businesses and interest groups can can begin giving unlimited amounts of money to Missouri politicians in January." Delk requests that the Court take judicial notice of this readily ascertainable fact.

constitution and those of the states was to curb the abuses inherent in the British parliamentary system, which countenanced conflicts of interest and concentrated power. The American colonies rebelled against such a system of government, when this nation was formed. *See generally* Gordon S. Wood, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, p. 158 (1969) [hereinafter "WOOD"]. Americans felt compelled to isolate their legislatures from any sort of influence or impingement, thus setting American constitutional development in an entirely different direction from that of the former mother country. Therefore, every state eventually adopted and constitutionalized a radically different system than the one used in Great Britain, creating one in which "[t]he leading feature of the constitution is the separation and distribution of the powers of the government," ***Payne & Butler v. Providence Gas Co.***, 31 RI 295, 317, 77 A 145, 154 (1910) (quoting Thomas M. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS, 242 (Little, Brown 7th ed 1903)). Anti-corruption and anti-conflict of interest measures were a primary concern of colonial Americans when they framed the original state and federal Constitutions. See WOOD, at 132-43.

Thomas Jefferson expressed a similar point of view:

> The time to guard against corruption and tyranny, is before they shall have gotten hold on us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered.

Thomas Jefferson, "Notes on the State of Virginia," in WRITINGS, p. 246 (Library of America, 1984). Delk and others thus sought to assure that the wolf would be kept a bay by both limiting campaign contributions and reducing the likelihood that legislators would be tempted to eliminate or weaken such limits.

Plaintiffs' analysis is flawed, as it would allow petitioners to offer voters huge and profound changes but not to offer small or lesser included changes. As Plaintiffs have stated,

the purpose of Article XVII, section 1 is to prevent logrolling, the combination of various unrelated provisions designed to induce various voters to support the whole package, merely because different voters support some of the unrelated parts.[9] IP 8 is the opposite of logrolling. It offers a very specific change in legislative authority to adopt and amend limits on political contributions.

### E. THE OPINION INCORRECTLY CHARACTERIZES INITIATIVE PETITION 8 AS IMPOSING A LIMITATION ON THE POWER OF THE LEGISLATURE, WHEN THE OPPOSITE IS TRUE.

The Court of Appeals opinion several times characterizes IP 8 as a limitation on legislative authority. 205 Or App at 308. But the opposite is true. As noted also by Defendant Bradbury, IP 8 constitutes solely a limited expansion of legislative authority and not a prohibition.

The Opinion states: "Thus, under IP 8, the legislature would be prohibited from passing such laws, except by a three-fourths majority." 205 Or App at 308. IP 8 contains no such prohibition and does not contain any prohibitions. The prohibition against the Legislature passing laws limiting campaign contributions already exists in Article I, Section 8, according to ***Vannatta v. Keisling***, 324 Or 514, 931 P2d 770 (1997), which 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.

---

9. Plaintiffs stated in their 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.

Thus, on the subject of campaign finance limitations, the status quo is that the Legislature cannot enact 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. IP 8 expands legislative authority by allowing the Legislature to enact and amend such prohibitions and limitations by 3/4 majorities.[10] It does not, however, **further** expand the authority of the Legislature to enact and amend such prohibitions and limitations by simple majority votes. IP 8 is a limited expansion of legislative power.[11]

Article IV, Section 25(1), does not establish that the Legislature has the authority to enact bills prohibiting or limiting political campaign contributions or expenditures by simple majority votes. Thus, IP 8 is in not a limitation on existing legislative power. It is a specific expansion of existing 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 Article I, Section 8, and ***Vannatta***. 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.

---

10. 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, the Court of Appeals opinion necessarily concludes 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 and that voters be banned from considering a smaller change to the Oregon Constitution on precisely the same subject.

11. At oral argument, Delk presented an exhibit (included in the Appendix to the Delk Petition for Review, App-10) illustrating that the Chief Petitioners on IP 8 wished to grant new LIMITED LEGISLATIVE POWER (LEVEL 1) to the Oregon Legislature and not BROAD LEGISLATIVE POWER (LEVEL 2). In other words, the Chief Petitioners wish to give the Legislature the power to enact or amend limits on political contributions but only by means of a 3/4 vote of each House. They do not wish to give the Legislature the broader power to enact or amend limits by simple majority votes.

**A necessary conclusion of the Court of Appeals's analysis is that 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.** Further, the opinion's analysis requires that 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 by a vote of other than a simple majority. If one amendment is enacted by voters and the other is not, then the state will end up (1) with a result not intended by the Chief Petitioners (new, unrestricted power to the Legislature) or (2) with nothing (an expressed limitation on a power that does not exist).

## F. INITIATIVE PETITION 8 CANNOT BE BROKEN INTO SEPARATE MEASURES, LOGICALLY OR LEGALLY.

It is impossible to break IP 8 into logical separate questions, as Plaintiffs urged. The Chief Petitioners do not seek a system of campaign finance reform that can be changed by simple majority vote of the Legislature, based on the history in other states, documented in the briefing. Instead, they propose a system under which the Legislature can correct errors and make other changes that have broad support, while not allowing a simple majority of the Legislature to abolish or impair limits be enacted by initiative.

Any breakdown of IP 8 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 (allowing legislatures to change limits on political contributions with simple majority votes), proven ineffective elsewhere, that is not the system desired by the Chief Petitioners. If Measure B alone passes, it is meaningless. In fact, Measure B would probably be considered merely advisory and thus not a proper ballot measure in the first place. ***City of Eugene v. Roberts***, 305 Or 641, 756 P2d 630 (1988); ***Amalgamated Transit Union v. Yerkovich***, 24 Or App 221, 228, 545 P2d 1401 (1976).

At oral argument before the Court of Appeals, counsel for Plaintiffs argued that the Chief Petitioners' purpose could be accomplished merely by offering voters two different amendments to the Oregon Constitution at the same time and making the enactment of each dependent upon the other. One amendment would authorize the Legislature to enact or amend political contribution limits. The other amendment would require that any such enactments or amendments be done by 3/4 vote of both houses. In order to preclude the outcome not wished by Delk (giving the Legislature the broader authority to enact or amend limits by majority votes), Plaintiffs suggested that each amendment would condition its effectiveness upon the adoption of the other amendment.

After oral argument, the Secretary of State, upon advice of the Attorney General, began refusing to provide ballot titles for any initiative petition expressly conditioned upon another initiative petition for its effectiveness.[12] On February 2, 2006, the Secretary of State, advised by the Attorney General, refused to authorize circulation of such "paired" measures (IP 138 and IP 139). The Attorney General's memoranda on these petitions concluded that, if two measures are expressly dependent upon the enactment of each other for their

---

12. Delk offered this fact, with documentation, as additional, later authority, but the Court of Appeals declined to accept the filing.

effectiveness, then they are not "measures" under Article IV at all.[13] This outcome (not allowing circulation of "paired" measures) was expressly urged to the Secretary of State by Plaintiffs' counsel in this case, Charles Hinkle, on behalf of a variety of Oregon electors.[14] Thus, it would not be possible to offer IP 8 by means of two separate changes to the Oregon Constitution, because the Attorney General, at the urging of Plaintiffs' counsel in this case, does not recognize such dependent proposals as "measures" that can qualify for signature gathering in the first place.

As IP 8 cannot be logically broken into separate measures, the changes it makes are closely related. The intent of the Chief Petitioners cannot be accomplished by two separate measures. For instance, consider an amendment that (1) establishes, as a special branch of the "judiciary," a court with lay judges and (2) authorizes non-attorneys to practice there. The intent of the drafters is to establish a court where the adjudicator must be a lay person and no lawyers can appear--that is, a court not dominated by lawyers. Under Plaintiffs' analysis, this can never be done in Oregon, because there would need to be separate amendments to provide for lay judges and to allow non-attorneys to practice. Plaintiffs' approach means that the people of Oregon can never obtain for themselves a vote on the entire concept, up or down, but must adopt each feature piecemeal. This prohibition on the opportunity for voters to use the initiative process to offer a coherent and workable amendment to the Oregon Constitution contravenes Article IV, Section 1, as it renders the initiative process powerless to amend the Constitution in an effective or meaningful way.

---

13. The Attorney General's memorandum was attached to the proffered Memorandum of Additional Authority by Defendant-Intervenor-Respondent David Delk (February 15, 2006). Delk requests judicial notice of this memorandum of the Attorney General.

14. These arguments are presented at http://www.sos.state.or.us/elections/irr/2006/138cmts.pdf and http://www.sos.state.or.us/elections/irr/2006/139cmts.pdf.

## II. IF AN INITIATIVE CANNOT INCLUDE BOTH A SUBSTANTIVE PROVISION AND A SUPERMAJORITY VOTING REQUIREMENT ON THE LEGISLATURE, THEN MANY PREVIOUSLY-ENACTED MEASURES ARE ALSO INVALID.

If IP 8 is contrary to Article XVII, section 1, then many amendments to the Oregon Constitution already enacted by the voters (or available to be enacted on the November 2006 ballot) are also invalid.

### A. MEASURE 86 (2000): THE INCOME TAX "KICKER" (REQUIRES REFUNDING GENERAL FUND REVENUES EXCEEDING STATE ESTIMATES TO TAXPAYERS).

Among the previously-enacted measures that include both substantive changes to the Constitution and creation of a supermajority voting requirement for the Legislature is Measure 86 (2000), which enacted Article IX, Section 14, commonly known as the "kicker amendment." As noted in the Delk Petition for Review:

> Section 14(1) directs the Governor to "cause an estimate to be prepared of revenues that will be received by the General Fund for the biennium beginning July 1." This estimate forms a revenue expectation baseline; if actual tax revenues for the biennium exceed this level by 2% or more, then the entire excess above the baseline must be returned to taxpayers. Thus, Section 14(1) is a very important determination and has often resulted in "kicker" refunds amounting to hundreds of millions of dollars.
>
> Section 14(6) then limits the power of the Legislative Assembly to change the Governor's baseline revenue estimate by requiring a two-thirds majority vote of both Houses.
>
> > (6)(a) Prior to the close of a biennium for which an estimate described in subsection (1) of this section has been made, the Legislative Assembly, by a two-thirds majority vote of all members elected to each House, may enact legislation declaring an emergency and increasing the amount of the estimate prepared pursuant to subsection (1) of this section.
> >
> > (b) The prohibition against declaring an emergency in an act regulating taxation or exemption in section 1a, Article IX of this Constitution, does not apply to legislation enacted pursuant to this subsection.

> Thus, the Legislature is not allowed to change the revenue estimate by ordinary statute, passed by simple majority votes. Without the restriction in Section 14(6)(a), the Legislature could countermand the Governor's baseline revenue estimate by statute enacted by simple majorities in the Senate and House.
>
> Section 14(6)(a) was not enacted by a separate vote but was part of Measure 86 (2000). Thus, the Opinion's analysis would fully apply, and Measure 86 (2000) must also be invalid.[15]

Measure 86 (2000) also changes the "balance of power" between the Legislature and the people using the initiative process. After enactment of Measure 86 (2000), the Legislature can change the Governor's revenue estimate only by means of two-thirds supermajority votes, but the people using the initiative process can change that estimate by a simple majority of those voting on an initiative to do that. Thus, Measure 86 (2000) would decrease the power of the Legislature relative to the people using the initiative process and would thus fail the test applied by the Court of Appeals.[16]

IP 8 grants authority to the people, using the initiative process, to enact and amend campaign finance limitations, subject to being countermanded by a joint 3/4 vote of both houses of the Legislature. Similarly, Measure 86 (2000) granted authority to the Governor to make revenue forecasts of enormous importance, subject to being countermanded by a joint 2/3 vote of both houses of the Legislature. The reasoning of the Court of Appeals would render Measure 86 (2000) invalid.

---

15. As is clear from the portion of its text set forth above, Measure 86 also expressly amended at least one other part of the Oregon Constitution, Article IX, section 1a.

16. An alternative interpretation of Measure 86 (2000) is that it would not allow the people using the initiative process to change the Governor's revenue forecast at all. If so, then Measure 86 (2000) changed the balance of power between the Legislature and the people using the initiative process by increasing the relative power of the Legislature.

## B. MEASURE 19 (2002): DEDICATION OF ADDITIONAL LOTTERY FUNDS TO EDUCATION.

Measure 21 (1995) dedicated specific percentages of Oregon State Lottery net proceeds to an "education stability fund." Measure 19 (2002) then increased the percentage of all lottery net proceeds that must go into that fund from 15% to 18%, as of July 1, 2003. Oregon Constitution, Article XV, Section 4(d). Measure 19 (2002) then also restricted the power of the Legislature to appropriate any part of the principal in the education stability fund for expenditure, requiring a three-fifths vote of both houses of the Legislature to appropriate any of those funds. Article XV, Section 6, states:

> (6) The Legislative Assembly may by law appropriate, allocate or transfer any portion of the principal of the education stability fund created under paragraph (d) of subsection (4) of this section for expenditure on public education if:
>
> > (a) The proposed appropriation, allocation or transfer is approved by three-fifths of the members serving in each house of the Legislative Assembly and the Legislative Assembly finds one of the following:
> >
> > > (A) That the last quarterly economic and revenue forecast for a biennium indicates that moneys available to the state's General Fund for the next biennium will be at least three percent less than appropriations from the state's General Fund for the current biennium;
> > >
> > > (B) That there has been a decline for two or more consecutive quarters in the last 12 months in seasonally adjusted nonfarm payroll employment; or
> > >
> > > (C) That a quarterly economic and revenue forecast projects that revenues in the state's General Fund in the current biennium will be at least two percent below what the revenues were projected to be in the revenue forecast on which the legislatively adopted budget for the current biennium was based; or
> >
> > (b) If the proposed appropriation, allocation or transfer is approved by three-fifths of the members serving in each house of the Legislative Assembly and the Governor declares an emergency.

Thus, Measure 19 (2002) established a new level of lottery proceeds dedication for the education stability fund and also imposed a three-fifths supermajority requirement on any act

by the Legislature to appropriate money from the fund. Absent that last feature of Measure 19 (2002), the Legislature may appropriate funds, by statute, with simple majority votes. The impingement on the Legislative powers by Measure 19 is in all respects greater than that of IP 8, as it requires not only supermajority votes but that the Governor declare an emergency or that certain ascertainable facts be found to exist by the Legislature.

Measure 19 (2002) also changes the "balance of power" between the Legislature and the people using the initiative process. After enactment of Measure 19 (2002), the Legislature can appropriate from the principal of the education stability fund only with three-fifths supermajority votes, but the people using the initiative process can appropriate from it by a simple majority of those voting on an initiative to do that. Thus, Measure 21 (1995) would decrease the power of the Legislature relative to the people using the initiative process and would thus fail the test applied by the Court of Appeals.[17]

### C. MEASURE 66 (1998): DEDICATES SOME LOTTERY FUNDING TO PARKS, BEACHES; HABITAT, WATERSHED.

Measure 66 (1998) dedicates 15% of net lottery proceeds to a "parks and natural resources fund" and specifies how the moneys shall be distributed (50% for financing protection, repair, operation and creation of state parks, ocean shore and public beach access areas, historic sites, and recreation areas; 50% for restoration and protection of salmon, watersheds, fish and wildlife habitats, and water quality). It then absolutely forbids the Legislature from limiting the spending of these monies.

---

17. An alternative interpretation of Measure 19 (2002) is that it would not allow the people using the initiative process to appropriate any of the principal of the education stability fund at all. If so, then Measure 19 (2002) changed the balance of power between the Legislature and the people using the initiative process by increasing the relative power of the Legislature.

> The Legislative Assembly shall not limit expenditures from the parks and natural resources funds.

This takes the limitation on the power of the Legislature to statutorily appropriate funds even beyond the limit in Measure 19 (2002). While Measure 19 (2002) allows the Legislature to appropriate from the education stability fund with three-fifths supermajority votes, Measure 66 does not allow the Legislature to affect expenditures from the parks and natural resources fund at all, regardless of the level of majorities in both houses.

Thus, Measure 66 established new dedication of lottery proceeds and also imposed a overwhelming supermajority requirement on any act by the Legislature to prevent expenditure of those funds for the purposes stated. Even unanimous votes of both houses are not sufficient.

Measure 66 also changes the "balance of power" between the Legislature and the people using the initiative process. After enactment of Measure 66, the Legislature cannot by statute stop the expenditure of funds from the parks and natural resources fund for the purposes specified by Measure 66. That prohibition applies expressly to the "Legislative Assembly," apparently leaving open the door for the people using the initiative process to limit expenditures from the parks and natural resources fund. Thus, Measure 66 decreased the power of the Legislature relative to the people using the initiative process and would thus fail the test applied by the Court of Appeals.

### D. MEASURE 30 (1996): STATE MUST PAY LOCAL GOVERNMENTS COSTS OF STATE-MANDATED PROGRAMS.

Measure 30 (1996) requires the Legislature to appropriate and allocate to local government moneys sufficient to pay the local government's costs of programs mandated by the Legislature. It then requires a three-fifths supermajority in both houses of the Legislature

to enact laws that are exempt from this reimbursement requirement. Article XI, Section 15(7). Article XI, Section 15(6) establishes another supermajority requirement.

> (6) Except upon approval by three-fifths of the membership of each house of the Legislative Assembly, the Legislative Assembly shall not enact, amend or repeal any law if the anticipated effect of the action is to reduce the amount of state revenues derived from a specific state tax and distributed to local governments as an aggregate during the distribution period for such revenues immediately preceding January 1, 1997.

Thus, Measure 30 (1996) established a requirement that local governments be reimbursed for the costs of state-mandated programs and also imposed a supermajority requirement on any act by the Legislature to exempt any program from this requirement or to change laws pertaining to a specific state tax.

Measure 30 (1996) also changes the "balance of power" between the Legislature and the people using the initiative process. After enactment of Measure 30 (1996), the Legislature can exempt programs from the reimbursement requirement only with three-fifths supermajority votes, but Measure 30 (1996) expressly preserves the power of the people using the initiative process to create or exempt programs from the reimbursement requirement. Article XI, Section 15(7)(f). Thus, Measure 30 (1996) surely decreased the power of the Legislature relative to the people using the initiative process and would thus fail the test applied by the Court of Appeals.

### E. MEASURES THAT IMPOSE SUPERMAJORITY VOTING REQUIREMENTS ON THE PEOPLE.

If a substantive amendment to the Oregon Constitution cannot be combined with imposition of a supermajority voting requirement on the Legislature, as that would alter the "balance of power" between the Legislature and the people using the initiative process, then the converse must also hold: A substantive amendment cannot be combined with imposition

of a supermajority voting requirement on the people. Several measures have done so, including Measure 47 (1996 initiative) and Measure 50 (1997 referral), which imposed upon voters the double majority requirement for the enactment of local option property taxes. These measures in no way changed the voting requirements in the Legislature for enacting new taxes or increasing existing taxes. According to the Court of Appeals analysis, Measures 47 and 50 would be invalid, because they changed the balance of power between the Legislature and the people on the subject of taxes, increasing the relative power of the Legislature.

## III. IF AN INITIATIVE CANNOT INCLUDE BOTH A SUBSTANTIVE PROVISION AND A SUPERMAJORITY LEGISLATIVE REQUIREMENT, THEN MEASURE 48 MUST ALSO BE REMOVED FROM THE NOVEMBER 2006 BALLOT.

If Plaintiffs' analysis prevails, then Measure 48 (2006) also must be removed from the ballot. If enacted, it would limit the increase in spending by the state government, from one biennium to the next, to the previous 2 years' percentage increase in state population and percentage increase in the Consumer Price Index for Portland-Salem. Section (3) of Measure 48 then provides:

> (3) The limit on total spending established by this section for each biennium may be exceeded for that biennium by an amount approved by two-thirds of each house of the Legislative Assembly and referred to and approved by a majority of electors voting on the issue in a general election.

Under the Court of Appeals analysis, Measure 48 must contravene the "separate vote" requirement, because it both enacts limits on state government spending and then alters the ordinary means by which the Legislature can enact a statute pertaining to spending. Under the current Oregon Constitution, the Legislature may enact such a statute upon simple majority votes in both houses, with the signature of the Governor. Alternatively, the Legislature may commence enactment of such a statute by simple majority votes in both

houses to refer the statute to the voters, who by majority vote in any election can enact the statute. Measure 48 would change the power of the Legislature to enact such a statute:

1. by simply majorities of both houses, accompanied by signature of the Governor;[18]

2. by simple majorities of both houses to enact a Joint Resolution to refer the statute to voters for a majority vote in a general election;[19] or

3. by simple majorities of both houses to refer the statute to voters for a majority vote in other than a general election.[20]

Thus, Measure 48 would alter, in at least these three ways, the manner currently provided in the Oregon Constitution for the Legislature to cause enactment of a statute pertaining to state government spending--in addition to enacting a substantive limit on the increase in state spending from one biennium to the next.

Measure 48 (2006) would also change the "balance of power" between the Legislature and the people using the initiative process. After enactment of Measure 48 (2006), the Legislature can exceed the spending limit only with two-thirds supermajority votes (and majority voter approval), but Measure 48 apparently would not allow the people using the initiative process to initiate a statutory measure approving or mandating that the spending limit be exceeded. Under Measure 48, the Legislature can refer such a statutory measure to voters, but there is no provision for the voters to initiate such a statutory measure. Thus,

---

18. Article IV, Section 25(2) requires a three-fifths vote of all members elected to each House in order to "pass bills for raising revenue." Measure 48 does not apply to bills for raising revenue. It applies to bills for spending revenue. And, in any event, two-thirds is not the same as three-fifths.

19. Simple majorities are necessary for joint resolutions. Article IV, Section 25(1).

20. Currently, the Constitution does not limit referrals by the Legislature only to general elections.

Measure 48 (2006) would increase the power of the Legislature relative to the people using the initiative process and would thus fail the test applied by the Court of Appeals.

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

The Court of Appeals opinion, 205 Or App at 301-02, disregards the analysis presented in the Response of Defendant-Intervenor-Respondent David Delk to Court's Further Inquiry on Justiciability (January 30, 2006) [hereinafter "Delk Response on Justiciability"].

### A. SUMMARY OF ARGUMENT.

There, Delk showed that the issue of justiciability of a pre-qualification or pre-enactment challenge to an initiative petition, alleging violation of Article XVII, section 1, is governed by ***Oregon Education Association v. Roberts***, 301 Or 228, 721 P2d 833 (1986). There, the Oregon Supreme Court recited its earlier holdings in ***State ex rel. Stadter v. Newbry***, 189 Or 691, 222 P2d 737 (1950), and ***Johnson v. City of Astoria***, 227 Or 585, 363 P2d 571 (1961), then stated:

> The constitutional provisions interpreted by the ***Johnson*** court were amended in 1968, so the question before us is whether those amendments changed the meaning of Article IV, Section 1.

*Id.* 301 OR at 231, 721 P2d at 834.[21] The Court then repeatedly emphasized that its decision allowing pre-enactment review in ***OEA v. Roberts*** was based specifically upon the new language in Article IV, section 1(2)(d), which applied to "a <u>proposed</u> law or amendment to the constitution." The basis for plaintiffs' challenge to IP 8, however, is not Article IV but

---

21. The Court did not state that the constitutional provisions interpreted by the ***Newbry*** court were amended. ***Newbry*** addressed compliance of an initiative with Article XVII, section 1. ***Johnson v. City of Astoria*** addressed the provision in Article IV, section 1(5), requiring that a local initiative must involve "municipal legislation," which has been interpreted to exclude administrative decisions.

is Article XVII, section 1, which does not refer to a proposed law or amendment but instead refers to "amendments" or "each amendment":

> When two or more amendments shall be submitted in the manner aforesaid to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately.

The Court found that it was the 1968 amendment to Article IV which overcame the lack of jurisdiction found in ***Johnson v. City of Astoria***, when addressing compliance with Article IV, section 1(2)(d).

> Before 1968, this court consistently held that courts could not consider constitutional challenges to initiative or referendum petitions before the voters adopted the measures. In ***Johnson v. City of Astoria***, 227 Or 585, 593, 363 P2d 571 (1961), the court stated that "it is equally inadmissible to inquire into the constitutionality of a proposed initiative measure when the remedy sought is mandamus to compel submission of the measure as when the proceeding is by injunction to restrain its submission." See also ***State ex rel. v. Newbry***, 189 Or 691, 693, 222 P2d 737 (1950). The constitutional provisions interpreted by the Johnson court were amended in 1968, so the question before us is whether those amendments changed the meaning of Article IV, section 1.
>
> The current phrasing of Article IV, section 1(2)(d), unlike former Article IV, sections 1 and 1a, requires that "a ***proposed*** law or amendment to the Constitution" deal with one subject only. (Emphasis added.) * * *
>
> A "proposed law or amendment to the Constitution" refers to a measure not yet enacted by the people. The Constitution itself guides our interpretation of the word "proposed." Article IV, section 1(2)(a), provides:
>
> > "The people reserve to themselves the initiative power, which is to ***propose*** laws and amendments to the Constitution and ***enact or reject*** them at an election independently of the Legislative Assembly." (Emphasis added.)
>
> This subsection distinguishes proposing a law from enacting or rejecting a law. The subsection shows that a proposed law is not an enacted law; voters could reject a proposed law rather than enact it. Because the word "propose" is used in subsection (2)(a), the word should have a similar meaning in subsection (2)(d). In the context of subsection (2)(d), a "proposed law" means a measure on which the people have not yet voted. Subsection (2)(d) should be read to mean that a measure which has not yet been enacted by the people "shall embrace one subject only and matters properly connected therewith."

***OEA v. Roberts***, 301 Or at 231-32, 721 P2d at 834.

The cases which address justiciability clearly distinguish between challenges to an initiative based on Article IV and those based on Article XVII. Here, plaintiffs assert only an Article XVII challenge. No party has cited an Oregon Supreme Court case allowing pre-enactment review of an initiative for alleged violation of Article XVII, section 1.[22] Every case cited in the Court of Appeals opinion involved pre-enactment review solely under Article IV, which was subject to the 1968 statutory exception noted in ***OEA v. Roberts***. The Legislature has not enacted similar exception for challenges based on Article XVII, section 1.

### B. THE CASES ALLOW A PRE-ELECTION CHALLENGES BASED UPON ALLEGED VIOLATION OF ARTICLE IV BUT NOT ON ALLEGED VIOLATION OF ARTICLE XVII, SECTION 1.

In ***League of Oregon Cities v. Oregon***, 334 Or 645, 56 P3d 892 (2002), the Oregon Supreme Court stated that it was an open question whether a pre-election challenge can be brought on grounds of violation of Article XVII.[23] This is confirmed by examination of the

---

22. We have found no such case having been heard by the Oregon Supreme Court. Two such cases were heard by the Court of Appeals, where no one had raised the issue of justiciability, but those cases were later dismissed by the Oregon Supreme Court as moot, because the deadline for submitting sufficient signatures had passed. ***Dale v. Keisling***, 167 Or App 394, 999 P2d 1229, *pet rev dismissed* as moot, 330 Or 567, 10 P3d 944 (2000); ***Sager v. Keisling***, 167 Or App 405, 999 P2d 1235, *pet rev dismissed* as moot, 330 Or 567, 10 P3d 944 (2000). In ***Sager***, the Supreme Court expressly dismissed the petition for review, the appeal, and the case itself as moot "for lack of a justiciable controversy."

23. This court has held that the Secretary of State has the duty to examine an initiative petition for compliance with the single-subject requirement of Article IV, section 1(2)(d), of the Oregon Constitution and to refuse to accept those that violate the rule. *OEA v. Roberts,* 301 Or 228, 235, 721 P2d 833 (1986). The parties assume that, in addition to that duty, the Secretary of State has the duty to examine an initiative petition for compliance with other form-of-adoption requirements of the Oregon Constitution, including the "full-text" requirement of Article IV, section

(continued...)

4 cases referenced in the Court of Appeals request for further briefing. ***State ex rel. Stadter v. Newbry***, 189 Or 691, 222 P2d 737 (1950), held that an Article XVII challenge could not be brought against an initiative before the election.

In ***Johnson v. City of Astoria***, 227 Or 585, 363 P2d 571 (1961), the challenge was based on the one subject requirement of Article IV, section 20. The Court found no jurisdiction to address that issue, prior to enactment of the measure by voters. ***OEA v. Keisling***, *supra*, then recognized that a 1968 amendment to the Oregon Constitution did allow pre-election challenges, if based upon the alleged failure of a "proposed law or amendment" to comply with the provisions of Article IV. Later, ***Foster v. Clark***, 309 Or 464, 790 P2d 1 (1990), also allowed a pre-election challenge based on failure to comply with Article IV.

**1. *NEWBRY*.**

In ***State ex rel. Stadter v. Newbry***, 189 Or 691, 222 P2d 737 (1950), the Court held that a challenge to a ballot measure, based on alleged violation of the separate vote requirement of Article XVII, section 1, was not within the jurisdiction of the courts, unless and until the measure was enacted by voters.

> This suit was instituted by the state upon the relation of Edward O. Stadter, Jr., district attorney for Marion County, against the Honorable Earl T. Newbry, secretary of state, and the above named sponsors of the proposed constitutional amendment. The complaint alleges that the proposed amendment is legally insufficient, in that, in violation of article XVII of the state constitution, it

---

23.(...continued)

> 1(d), the "separate-vote" requirement of Article XVII, section 1, and the constitutional revision requirements of Article XVII, section 2. Because there is no dispute in this case about the extent of the Secretary of State's duty to review an initiative petition, we assume without deciding that that duty includes the duty to review such a measure for compliance with all other constitutional provisions at issue in this case.

***League of Oregon Cities***, 334 Or at 656 n 11.

> combines as one amendment what are in fact three amendments, viz., an amendment to increase the membership of the senate, an amendment to change the term of office of some members of the senate, and an amendment to reapportion the legislature.

*Id.*, 189 Or at 693, 222 P2d at 738. The defendant Secretary of State argued that the courts had no jurisdiction to review an initiative for compliance with Article XVII, section 1, prior to enactment of the initiative. The Court agreed:

> We are of the opinion that the circuit court committed no error in sustaining the defendants' demurrers upon the ground of lack of jurisdiction. We need not, therefore, consider the other alleged errors which were assigned. The decree is affirmed.

*Id.,* 189 Or at 698, 222 P2d at 740.

### 2. *CITY OF ASTORIA*.

***Johnson v. City of Astoria***, 227 Or 585, 363 P2d 571 (1961), also involved an initiative which had otherwise qualified for the ballot, sufficient valid signatures having been submitted. The challenge was based on the one subject requirement of Article IV, section 20. The Court found no jurisdiction to address that issue, prior to enactment of the measure by voters. 227 Or at 591-93, 363 P2d at 574-75.

### 3. *OEA V. ROBERTS*.

In ***Oregon Education Association v. Roberts***, 301 Or 228, 721 P2d 833 (1986), the Court recited its earlier holdings in ***Newbry*** and ***Johnson v. City of Astoria***, then noted, "The constitutional provisions interpreted by the ***Johnson*** court were amended in 1968, so the question before us is whether those amendments changed the meaning of Article IV, Section 1." *Id.* 301 OR at 231, 721 P2d at 834.[24] The Court then repeatedly emphasized that its

---

24. The Court did not state that the constitutional provisions interpreted by the ***Newbry*** (continued...)

decision allowing pre-enactment review in ***OEA v. Roberts*** was based specifically upon the new language in the one subject requirement of Article IV, section 1(2)(d), which applied to "a proposed law or amendment to the constitution." The basis for plaintiffs' challenge to IP 8, however, is Article XVII, section 1, which does not refer to a proposed law or amendment but instead refers to "amendments" or "each amendment":

> When two or more amendments shall be submitted in the manner aforesaid to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately.

As quoted above, the Court found that the 1968 amendment to Article IV overcame the lack of jurisdiction found in ***Johnson v. City of Astoria***, when addressing compliance with Article IV, section 1(2)(d). ***OEA v. Roberts***, 301 Or at 231-32, 721 P2d at 834.

Thus, the ***OEA v. Roberts*** opinion merely reflected the express change to the one subject requirement set forth in Article IV. There was no similar change (or any change) to Article XVII, section 1, which continues to apply only to "amendments" or "each amendment," with no reference to "proposed."

> Subsection (4)(b) requires the Secretary of State to submit measures to the people in a form consistent with Article IV, section 1. Subsection (4)(b) refers to the process of submitting measures to the people, which occurs before enactment. Because subsection (2)(d) refers to unenacted measures proposed by petition, the unambiguous wording of subsection (2)(d) refers to pre-election review of measures. Therefore, based on the plain meaning of the word "proposed" in Article IV, section 1(2)(d), the Secretary of State must determine whether "proposed laws" contain one subject only.

***OEA v. Roberts***, 301 Or at 232, 721 P2d at 835.

---

24.(...continued)

> court were amended. ***Newbry*** addressed compliance of an initiative with Article XVII, section 1. ***Johnson v. City of Astoria*** addressed the provision in Article IV, section 1(5), requiring that a local initiative must involve "municipal legislation," which has been interpreted to exclude administrative decisions.

***OEA v. Roberts*** held that the Secretary of State has a duty to determine whether a proposed initiative complies with the one subject only requirement of Article IV, section 1(2)(d), at the time at which the prospective petition is approved. The case did not address Article XVII requirements nor at what stage of the process that determination could be challenged in court or who would have standing to bring such a challenge at any particular stage. Further, in ***Foster v. Clark***, 309 Or 464, 790 P2d 1 (1990), the Court's holding expressly pertained only to local measures and their compliance with Article IV, section 1(5), not to statewide measures or compliance with Article XVII, section 1.

> We adhere to the more recent authorities, such as ***Holmes v. Appling***, *supra*, as being the more clearly reasoned and stating the correct rule, which is: Courts have jurisdiction and authority to determine whether a proposed initiative or referendum measure is one of the type authorized by Oregon Constitution, Article IV, section 1(5) to be placed on the ballot. This means that a court may inquire into whether the measure is "municipal legislation," because that qualifying language is used in the constitution itself. On the other hand, a court may not inquire into general questions of constitutionality, such as whether the proposed measure, if enacted, would violate some completely different portion of the constitution.

***Foster v. Clark***, 309 Or at 471, 790 P2d at 5. Article XVII, section 1, is a different portion of the Oregon Constitution than Article IV, section 1(5) or Article IV, section 1(2)(d).

#### 4. *KEISLING V. NORBLAD.*

It is not surprising that the Court would allow pre-enactment review for compliance with Article IV. After all, the numeric signature requirements are part of Article IV, so review for compliance with Article IV requirements is quite necessary. Conversely, the Court has never countermanded ***Newbry***, applicable to challenges based on Article XVII. As J. Unis stated in concurrence in ***State ex rel Keisling v. Norblad***, 317 Or 615, 633-35, 860 P2d 241 (1995):

> ***State ex rel. v. Newbry et al***, 189 Or 691, 222 P2d 737 (1950), involved a constitutional amendment proposed by initiative petition. A challenge was brought under Article XVII, alleging "that the proposed amendment is legally insufficient, in that, in violation of Article XVII of the state constitution, it combines as one amendment what are in fact three amendments * * *." *Id*. at 693, 222 P2d 737. This court held that it could not order the Secretary of State to examine the initiative measure for compliance with Article XVII, section 1. Id. at 694-98, 222 P2d 737. The court reasoned that for the judicial branch to determine the constitutionality of the measure in advance of its enactment would be a fundamental interference with the people's legislative authority that would violate separation of powers principles. *Id*. at 697-98, 222 P2d 737. 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).
>
> In ***OEA v. Roberts***, *supra*, this court held that the trial court erred in dismissing an action against the Secretary of State that asserted that the Secretary of State had failed to exercise pre-enactment review of an initiative measure for compliance with the single-subject requirement of Article IV, section 1(2)(d), of the Oregon Constitution. Citing prior decisions, including ***Newbry***, this court in Roberts stated that "[b]efore 1968[,] this court consistently held that courts could not consider constitutional challenges to initiative or referendum petitions before the voters adopted the measures." ***OEA v. Roberts***, *supra*, 301 Or at 231, 721 P2d 833. However, this court concluded that Article IV, section 1, had been amended in such a way as to give rise to a specific duty requiring "the Secretary of State [to] determine whether 'proposed laws' contain one subject only," *id*. at 232, 721 P2d 833, a duty that arises "when [the Secretary of State] approves a prospective petition [for signature gathering]." *Id*. at 235, 721 P2d 833. Having established the existence of the Secretary of State's duty to review proposed laws for one-subject compliance, the court remanded the case to the circuit court for consideration whether the Secretary of State had discharged that responsibility properly.
>
> * * * 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***.

Thus, the critical distinction drawn in the cases is whether the initiative is being challenged for failure to comply with the Article IV requirements for a "proposed amendment" or whether it is being challenged for failure to comply with Article XVII

requirements. In the former case, pre-election challenges are justiciable. In the latter case, they are not. Here, plaintiffs are bringing a challenged based on Article XVII against IP 8.

### C. THE CRITICAL DISTINCTION IS BETWEEN ARTICLE IV AND ARTICLE XVII, NOT BETWEEN "FORM OF ADOPTION" AND "SUBSTANTIVE" CHALLENGES.

The distinction is not whether an inquiry into an initiative for an amendment to the Oregon Constitution can be characterized as "substantive" or "form of adoption." The Court has recognized that an inquiry regarding compliance with the "one amendment" or "single vote" requirement in Article XVII is not merely "form of adoption," because it requires investigation into whether the proposed changes to the constitution are "substantive" and what "effects" the measure has on the existing constitution. ***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), stated that the separate vote requirement is not merely concerned with the form of the amendment.

> "That is, in addition to speaking to the form of submission, the separate-vote requirement addresses the extent to which a proposed amendment would *modify* the existing constitution. That is significantly different from the wording of the single-subject requirement, which focuses in isolation upon only the text of a proposed amendment in requiring that it embrace a single subject." [***Armatta v. Kitzhaber***, 327 Or 250, 275-76, 959 P2d 49 (1998)] (emphasis in original; citations omitted).
>
> The Court of Appeals' opinion in ***Dale*** fails to take into account that crucial difference between the single-subject requirement and the separate-vote requirement and, therefore, relies too heavily on their similarity. In particular, the Court of Appeals' summary of the separate-vote requirement as the single-subject requirement "with teeth" suggests, incorrectly, that the difference between the two requirements is only a matter of degree. As the foregoing quotations from ***Armatta*** demonstrate, however, the two requirements differ in kind.

***Lehman v. Bradbury***, 333 Or at 241-42.

Moreover, pre-enactment review where the remedy amounts to permanently enjoining continued political activity both chills that activity and amounts to an impermissible prior restraint, while post-election review adequately protects any interest a plaintiff might have in voiding an unconstitutional enactment. As such, pre-enactment nullification of the measure may be an impermissible prior restraint on core expressive conduct under the First Amendment. Initiative petition circulation is core political speech for which First Amendment protection is at its zenith. ***Buckley v. American Constitutional Law Foundation, Inc., et al***., 525 US 182, 119 SCt 636, 142 LEd2d 599 (1999). "[P]rior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights." ***Nebraska Press Association v. Stuart***, 427 US 539, 559, 96 SCt 2791, 2803, 49 LEd2d 683 (1976).

## V. 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. The proposed rule of law is that plaintiffs cannot bring such claims to court, if they failed to raise those claims in the agency proceeding. ***Ayres v. Board of Parole and Post-prison Supervision***, 194 Or App 429, 435, 97 P3d 1 (2004); ***Mullenaux v. Dept. of Revenue***, 293 Or 536, 539, 651 P2d 724 (1982).

The Court of Appeals opinion recites the comments of Plaintiffs filed with the Secretary of State. 205 Or App at 305. Their comments do not mention, even once, any claim that IP 8 amends Article IV, Section 25. Instead, Plaintiffs' argument to the Secretary of State was solely that IP 8 would amend Article I, Section 8, and Article IV, Section 1. Their argument to the Secretary of State was not that IP 8 would amend Article IV, Section 25 but that it would implicitly amend Article IV, Section 1, by shifting "the balance of legislative power which is now equally shared by the Legislature and the People (through the initiative and referendum)." 205 Or App at 305.[25] Thus, Plaintiffs deprived the Secretary of State from ruling on a claim IP 8 amends Article I, Section 25(1), as that contention was never presented in the administrative proceeding.

The Court of Appeals opinion concluded that Plaintiffs' comments to the Secretary of State were close enough.

> In that letter [to the Secretary of State], plaintiffs raised the issue that IP 8 violated the separate-vote requirement of Article XVII, section 1. They also made the argument that IP 8 violated that section because it proposed at least two changes to the constitution that are not closely related. Although, as part of that argument, plaintiffs asserted that IP 8 proposed to change Article I, section 8, and Article IV, section 1 -- as opposed to Article IV, section 25(1), as they asserted to the trial court and this court -- the thrust of plaintiffs' argument has remained constant: IP 8 would alter the legislative power by requiring a three-fourths majority to enact and amend legislation relating to campaign finance, and that change is not closely related to the proposed change to remove campaign finance legislation from the protections of Article I, section 8. In sum, plaintiffs

---

25. As noted above, Plaintiffs then did not make the "shifting the balance of power" claim or argument to Marion County Circuit Court or to the Court of Appeals, except within the context of the Republican Form of Government claim that they made in their Complaint.

> raised the issue that they now advance before defendant Secretary of State, consistently relied on Article XVII, section 1, as the source for their position, and made nearly identical arguments to defendant Secretary of State and the courts. It follows that, assuming they were required to do so, plaintiffs exhausted their administrative remedies.

205 Or App at 305-06. In fact, Plaintiffs comments to the Secretary of State never mentioned Article IV, Section 25, even once. They never stated that IP 8 amended that section by changing legislative voting requirements. Instead, they argued to the Secretary of State that IP 8 constituted more than one amendment because it affected Article V, section 1, by making a "dramatic shift in the balance of legislative power which is now equally shared by the Legislature and the People (through the initiative and referendum)." 205 Or App at 305. Then Plaintiffs did not pursue the "balance of power" argument in court.

Thus, Plaintiffs did not present to the agency the only claim they have pursued in court, and they abandoned in court the only separate-vote claim they made to the agency.

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].[26] If 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***, *supra*, 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:

---

26. The entire document is available at:

> 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.

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).

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.

Additional argument on this subject is presented in the Delk Brief on Appeal (June 16, 2005), pp. 6-13.

At oral argument before the Court of Appeals, Plaintiffs cited ***Marbet v. Portland General Electric Co.***, 277 Or 447, 561 P2d 154 (1977), for the proposition that a party appealing an administrative order need not have raised before the agency the issue pursued in the courts. But in ***Marbet***, the appellant before the Oregon Supreme Court was pursuing an issue that had indeed been raised at the agency, although not by him.

> It does not follow that each intervenor has standing to seek judicial review only of issues arising from his individual intervention. Such a

> rule could preclude a person who intervenes from securing review of the legality of the final order on issues that the agency in fact decided on someone else's initiative. No rule compels that result.

227 Or at 455. Here, however, Plaintiffs are pursuing a claim, based on Article IV, Section 25(1), that was never presented to the administrative decision-maker.

Dated: August 18, 2006

Respectfully Submitted,

DANIEL W. MEEK
OSB No. 79124
10949 S.W. 4th Avenue
Portland, OR 97219
(503) 293-9021 fax 293-9099

Attorney for
Intervenor-Defendant-
Respondent David Delk

## CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed with the State Court Administrator, by hand delivery this date, the original and 15 copies, and I further certify that I served two true copies of the foregoing OPENING 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.

Charles Hinkle
Scott Kaplan
Stoel, Rives
900 S.W. 5th Avenue #2600
Portland, OR 97204-1268
503-224-3380

Charles Fletcher
Trial Attorney
Oregon Department of Justice
1162 Court Street N.E.
Salem, OR 97301-4096
502-378-6313

Dated: August 18, 2006

_____
Daniel W. Meek