IN THE COURT OF APPEALS OF THE STATE OF OREGON

ANDREA R. MEYER and DAVID FIDANQUE,

Plaintiffs-Appellants,

v.

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

Defendant-Respondent,

and

DAVID DELK,

Defendant-Intervenor-Respondent.

Marion County Circuit Court No. 04C-20669

Court of Appeals No. A127935

RESPONSE OF DEFENDANT-INTERVENOR-RESPONDENT DAVID DELK TO COURT'S FURTHER INQUIRY ON JUSTICIABILITY

Appeal from the Judgment of the Circuit Court for Marion County

Honorable Claudia M. Burton, Judge

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TABLE OF CONTENTS

This memorandum responds to the letter of the Court, dated January 9, 2006, which directed the parties to address the application of four cases involving the justiciability of pre-election challenges to ballot measures.

The justiciability issues raised in the four cases referenced in the Court's letter are different from, and in addition to, the justiciability arguments presented in the Brief of Defendant-Intervenor-Respondent David Delk (June 16, 2005), pp. 2-18. Delk's justiciability arguments there are that:

1. Plaintiffs failed to exhaust their administrative remedies, because they never presented to the Secretary of State their only contention before this court--that Petition 8 amends both Article I, Section 8 and Article IV, Section 25(1). In fact, their submittal to the Secretary of State does not even refer to Article IV, Section 25. Oregon law does not permit plaintiffs to 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).[1]

2. Plaintiffs do not have standing to bring a pre-qualification challenge, because they failed even to allege facts sufficient to support standing under ***League of Oregon Cities v. Oregon***, 334 Or 645, 658-59, 56 P3d 892 (2002), and ***Barton v. City of Lebanon***, 193 Or App 114, 117-18, 88 P3d 323 (2004).

3. Plaintiffs do not have standing sufficient to obtain the relief that plaintiffs seek. This is not a class action, and at the current pre-qualification stage only two individual plaintiffs claim a right to be free of the possibility that someone will ask them to sign Petition 8. Even if that occurred, plaintiffs have failed to articulate, much less prove, that even each of them is entitled to be free of this form of political communication, which is where the "First Amendment is at its zenith." ***Buckley v. American Constitutional Law***

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1. It is permissible to argue on appeal of an agency decision an issue that others did raise in the agency proceeding, ***Marbet v. Portland General Electric Co.,*** 277 Or 447, 456, 561 P2d 154 (1977), since this "afford[s] the agency an opportunity to rule on the substance of the dispute." ***Mullenaux***, 293 Or at 539. The issues appealed by Marbet had been raised by other parties in the agency proceeding. No case has held that a litigant can appeal an agency order on grounds that no one raised in the agency proceeding.

> ***Foundation***, 525 U.S. 182, 186-87, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999) [hereinafter "***ACLF***"]; ***Meyer v. Grant***, 486 U.S. 414, 425, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988).[2]

As for the justiciability doctrines in the four referenced cases, the instant case is unlike any other yet adjudicated in Oregon, because it is a pre-qualification challenge based on Article XVII, section 1.[3] 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.[4]

By "pre-qualification" we mean that the initiative has not yet qualified to appear on the ballot, ordinarily because sufficient signatures have not been submitted. In every Oregon case in which pre-election justiciability of challenges to initiatives is discussed (except one, which did not involve an Article XVII challenge), the initiative had already proceeded beyond the pre-qualification stage and had been certified by the election official as having sufficient signatures and as having otherwise met all of the legal requirements to appear on the ballot as

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2. Nor do plaintiffs address how devastating restrictions on this core political speech would be consistent with Article I, Section 8, of the Oregon Constitution.

3. It appears that ***State ex rel. Stadter v. Newbry***, 189 Or 691, 222 P2d 737 (1950), was a not a pre-qualification challenge, because the opinion frequently refers to initiative petitions which have been filed in proper form and containing "the requisite number of signatures." 189 Or at 696-97. It is clear that the three other referenced cases were not pre-qualification challenges.

4. ***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."

an initiative.[5] Here, however, Petition 8 remains in the pre-qualification stage. When the courts have been offered challenges to such measures based on alleged noncompliance with Article XVII, their response has been to dismiss for mootness (if the deadline has passed).[6]

In addition, 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

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5. The exception is ***Oregon Education Association v. Roberts***, 301 Or 228, 721 P2d 833 (1986), which involved a pre-qualification challenge based on Article IV, not Article XVII.

6. In ***Lowe v. Keisling***, 130 Or App 1, 7, 882 P2d 91, 94 (1994) (in banc), *review dismissed*, 320 Or 570 (1995), the court heard plaintiff's claim that the proposed measure would constitute a revision of the Constitution, rather than an amendment. No party in ***Lowe*** argued that the proposed initiative violated the "one amendment" or "single vote" requirements. Thus, plaintiffs' contention there was that the initiative did not qualify under Article IV, which allows the people to "propose laws and amendments to the Constitution" and not revisions of the Constitution. The trial court dismissed 4 other pre-qualification challenges on grounds of ripeness, because the Secretary of State had not certified that sufficient valid signatures had been submitted for the initiative to qualify for the ballot. Later, the Oregon Supreme Court dismissed the petition for review as moot, because the measure had by then been defeated at the November election. JJ. Unis, Durham, and Fadeley concluded that all opinions in the case should be vacated. That expressly became the unanimous position of the Justices in ***First Commerce of America, Inc. v. Nimbus Center Associates***, 329 Or 199, 986 P2d 556.

> On reflection, we hold that the better practice when a case becomes moot on appeal or on review is to vacate both the decision of the Court of Appeals and the circuit court judgment. See ***Lowe v. Keisling***, 320 Or 570, 577, 889 P2d 916 (1995) (Unis, J., dissenting) (so stating). Reversal implies that a court incorrectly decided the case on the merits. Vacation of a decision, by contrast, suggests nothing about the propriety of the decision on the merits, because it conveys the message that the decision on the merits ought not to have been rendered at all (if the controversy was moot when the case was decided) or ought not have prospective effect (if the controversy became moot after the case was decided).

329 Or at 208-09. Since then, it has become the Court's practice to vacate decisions rendered moot during appeal.

As noted above, the Oregon Supreme Court dismissed as moot all claims in ***Dale*** and ***Sager***, after the deadline to submit signatures had passed.

only an Article XVII challenge. The Oregon Supreme Court has never authorized a pre-election (much less pre-qualification) challenge based on Article XVII. Instead, the cases referenced by the Court's inquiry clearly show that, before Article IV was amended in 1968 to add the word "proposed" in front of "amendment," the Court did not allow pre-election challenges alleging violation of Article IV or violation of Article XVII. As the Court repeatedly emphasized in ***OEA v. Keisling***, it was the 1968 amendment to Article IV that subsequently allowed pre-election challenges asserting violations of Article IV. Article XVII has never been so amended.

There are at least two unique justiciability questions presented by this case, in addition to the exhaustion of administrative remedies and lack of standing issues discussed in Delk's earlier briefing. The Oregon Supreme Court has not decided the following questions:

1. Can a plaintiff mount a challenge to a ballot measure on grounds of Article XVII, section 1, prior to the election?

2. Can a plaintiff mount a challenge to a ballot measure on grounds of Article XVII, section 1, during the pre-qualification period--prior to when the initiative otherwise qualifies for the ballot (confirmation that sufficient valid signatures have been submitted)?[7]

While it is easy to gloss over these considerations when discussing cases, the Court should ask these questions about every pre-election case cited:

1. Was this case decided pre-qualification of the measure for the ballot, apart from the challenge at issue?

2. Was the claim based on Article IV or Article XVII of the Oregon Constitution?

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7. ***Ellis v. Roberts***, 302 Or 6, 725 P2d 886 (1986), was a "single subject" challenge to an initiative petition pertaining to homestead exemption from property taxes and banning a general sales tax, but it was brought after the initiative had otherwise qualified for the ballot. It was not a pre-qualification challenge.

This case is a challenge based on Article XVII to an initiative in the pre-qualification phase. We are not aware of any discussion in any Oregon case on the justiciability of such a challenge.

I. THE OREGON COURTS HAVE NOT HELD THAT PRE-ELECTION ARTICLE XVII CLAIMS AGAINST INITIATIVES ARE JUSTICIABLE.

A. SUMMARY.

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.[8] This is confirmed by examination of the four referenced cases. ***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.***

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8. 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 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.

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.

B. DETAILS ON THE FOUR REFERENCED CASES.

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 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.

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.

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.[9] The Court then repeatedly emphasized that its 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 Petition 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.

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).

> 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

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9. 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.

> 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.

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.

Thus, the change in Article IV that caused the Court to effectively reverse ***Johnson v. City of Astoria*** has never been made to Article XVII, section 1. Perhaps that is why there are no Oregon cases in which the courts have rejected justiciability challenges to a pre-qualification review of a prospective petition for compliance with Article XVII, section 1--the exact review that plaintiffs herein seek.

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 did the Court address 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. In ***Foster v. Clark***, 309 Or 464, 790 P2d 1 (1990), the Court also addressed a proposed measure that had already "obtained sufficient signatures to [be] placed on the May 15, 2990, primary ballot." Thus, it had progressed beyond the pre-qualification stage. Further, 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 completely different portion of the Oregon Constitution than Article IV, section 1(5) or Article IV, section 1(2)(d).

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).
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> 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.
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> * * * 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 Petition 8.

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).
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> 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.

II. THE OREGON COURTS HAVE NOT HELD THAT PRE-QUALIFICATION ARTICLE XVII CLAIMS AGAINST INITIATIVES ARE JUSTICIABLE.

Here, justiciability is further in question, because Petition 8 has not, but for the challenge brought by plaintiffs, otherwise qualified for the ballot. In nearly all cases allowing pre-election challenges, the measure at issue has already otherwise qualified for the ballot. If it has not, the courts dismiss such claims as unripe (if the deadline for submitting signatures has not passed) or as moot (if the deadline has passed).

The cases distinguish two periods, the post-election period and the pre-election period. But the pre-election period itself must be divided into the one that is after the measure has otherwise qualified for the ballot (the post-qualification period) and one that is before the measure has otherwise qualified for the ballot (the pre-qualification period).

The four cases referenced by the Court, except ***OEA v. Roberts***, deal with the post-qualification period. The remedy, should a plaintiff ultimately prevail during that period, is to

remove the measure from the ballot. In this case, however, Petition 8 remains in the pre-qualification period.[10] Plaintiffs assert that the remedy during this phase would be halting the gathering of signatures on the petition, but we have found no case in which any Oregon court has done so, based upon alleged violation of Article XVII.

Also, it would appear that plaintiffs' challenge to Petition 8 is not ripe, because Petition 8 has not yet otherwise qualified for the ballot. Once it otherwise qualifies for the ballot, plaintiffs may advance their argument that they are somehow entitled to a ballot unmarred by measures that may prove unconstitutional, as in ***Ellis v. Roberts***, 302 Or 6, 725 P2d 886 (1986). Until then, plaintiffs' only standing to challenge Petition 8 depends upon their assertion that they are harmed by the mere presence of Petition 8 in the circulation process--that the exercise of core political speech under the First Amendment by those who are gathering signatures somehow harms Andrea Meyer and David Fidanque in a cognizable and unique way.

Until Petition 8 qualifies for the ballot, any decision by this Court would be purely advisory. If petitions which have not yet qualified with sufficient signatures are subject to judicial review for compliance with Article XVII, section 1, the courts should expect the filing of such cases to multiply, as have the filing of ballot title challenges. The Oregon Supreme Court is currently hearing ballot title challenges to 29 separate initiatives. If a court decision, other than one by the Oregon Supreme Court, is effective in countermanding the decision by the Secretary of State to approve circulation of the petition, then nearly every proposed constitutional amendment would likely be subject to such challenges, with none of them likely to be resolved by the Oregon Supreme Court in a manner timely enough to enable

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10. We noted this in the Brief of Defendant-Intervenor-Respondent David Delk, p. 18.

the petitioners to complete their task of collecting the necessary signatures. After all, Petition 8 was the second earliest petition to be approved for circulation in the 2006 election cycle, and appellate review of plaintiffs' suit is not complete.

Certainly, all residents of Oregon have a right to be free from the application of unconstitutional laws, including amendments to the Oregon Constitution adopted in violation of the "separate vote" requirement. As we have been arguing, Plaintiffs have not established, however, that they can assert, on behalf of all residents of Oregon, either of these alleged "rights":

1. Right to be free of the possibility of being asked for a signature on a petition proposing a measure that might ultimately be found in violation of the "separate vote" requirement; or

2. Right to be free of having on the ballot a petition proposing a measure that might ultimately be found in violation of the "separate vote" requirement, particularly when the government officials in charge of the election process have determined that there is no such violation.

As to the first alleged right, in ***Buckley v. ACLF***, *supra*, the United States Supreme Court struck down a variety of statutes adopted by Colorado that inhibited opportunities for petitioners to communicate with voters. The Court stated:

> Precedent guides our review. In ***Meyer v. Grant,*** * * *, we struck down Colorado's prohibition of payment for the circulation of ballot-initiative petitions. Petition circulation, we held, is "core political speech," because it involves "interactive communication concerning political change." *Id.,* at 422, 108 S.Ct. 1886 (internal quotation marks omitted). First Amendment protection for such interaction, we agreed, is "at its zenith." *Id.,* at 425, 108 S.Ct. 1886 (internal quotation marks omitted).

525 U.S. at 186-87.

As to the second alleged right, any decision of this Court should allow the signature gathering to continue. If sufficient signatures are submitted, then the Secretary of State can

address whether to place Petition 8 on the ballot, should this Court have ruled against Petition 8 on the merits and the Oregon Supreme Court not yet have ruled on the merits.

If this Court does determine that the current matter is justiciable, despite these deficiencies, and rules against Petition 8 on the merits, the justiciability arguments nevertheless pertain to the appropriate relief. We have found no Oregon case in which an initiative petition signature drive has been halted on "separate vote" grounds, where the Secretary of State and Attorney General have concluded that the initiative at issue complies with all constitutional procedural requirements (which is the case for Petition 8). Should this Court rule against Petition 8 on the merits, the Court should not order the Secretary of State to withdraw its approval for the circulation of Petition 8. Such withdrawal of approval would effectively kill the initiative, it would halt signature gathering, whether or not the Oregon Supreme Court considers the merits and rules in favor of Petition 8. This would ordinarily take several months. All signatures are due for filing on July 7, 2006.

If a consequence of a decision by this Court is the withdrawal of approval for circulation, that would amount to calling off the Super Bowl at halftime, with the Steelers ahead, and not allowing the Seahawks any chance to win.

Withdrawal of approval for circulation would cause irreparable harm to the Chief Petitioners and all circulators and supporters of the initiative. As noted in the attached Affidavit of Elizabeth Trojan, the signature drive for Petition 8 has to date collected over 83,000 signatures toward the requirement of 100,840 valid signatures at a cost exceeding $100,000, plus uncounted thousands of volunteer hours.[11] The campaign has received

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11. Because not all collected signatures will be valid, the campaign is seeking to gather at least 150,000 signatures prior to the July 7, 2006, deadline.

contributions from over 600 individuals and volunteer efforts from over 120 volunteers. Further, Petition 37 is a statutory campaign finance reform measure that depends upon enactment of Petition 8 for its validity. Supporters have collected an additional 63,000 signatures on that petition toward the required 75,630 valid signatures.

Even temporary withdrawal of approval to circulate would permanently destroy these efforts, not to mention discourage future efforts to change Oregon law by initiative, even if the Oregon Supreme Court were later to decide that Petition 8 does comply with the "separate vote" requirement. By then, of course, plaintiffs would no doubt argue that the matter is moot, since the deadline for submitting the signatures to the Secretary of State would have passed, prior to the Oregon Supreme Court's eventual decision. Since Oregon does not employ the federal doctrine of "capable of repetition, yet evading review,"[12] Oregon courts cannot rule on moot election law cases, even if that means, on a practical basis, not reviewing election law decisions that become moot very quickly (as soon as the opportunity to place the matter to the voters has come and gone).

Chief Petitioner Delk and supporters of Petition 8 have acted with great diligence and promptness in their efforts to put this initiative on the ballot. The prospective petition was filed on August 18, 2004, nearly 23 months prior to the signature submittal deadline. After failing to raise any issue involving Article IV, Section 25(1) in the Secretary of State's administrative proceeding (expressly for the purpose of hearing such issues), plaintiffs filed their suit on December 17, 2004. All parties filed summary judgment motions and waived

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12. The judicial power under the Oregon Constitution does not extend to moot cases that are "capable of repetition, yet evading review."

Yancy v. Shatzer, 337 Or 345, 363, 97 P3d 1161 (2004).

hearing at the Circuit Court, although plaintiffs caused delay by unsuccessfully opposing Delk's petition to intervene. Before this Court, only the Attorney General has sought any extensions of time. If this Court rules against Petition 8 on the merits which causes a halt to circulation, it will demonstrate that even the most diligently pursued initiative can be destroyed by a decision of court that itself remains subject to review by the highest Oregon court.

Unlike cases involving post-election challenges, there is no opportunity for defendant-intervenor to demand or suggest certification to the Oregon Supreme Court. ORS 250.044. In ***Foster v. Clark***, *supra*, the Court of Appeals did immediately certify the case to the Oregon Supreme Court, thus allowing swift resolution and not penalizing the initiative proponents merely due to the passage of time.

Plaintiffs have shown no harm from the mere gathering of signatures. We pointed out below and in briefing here that the plaintiffs have no right to be free of the type of core political speech consisting of the possibility they might be asked by someone to sign Petition 8. If plaintiffs do have some right to be free of being talked to by Petition 8 circulators, then the Court should order Chief Petitioner Delk to notify petitioners not to ask Andrea Meyer or David Fidanque for their signatures. Plaintiffs did not file their challenge to Petition 8 as a class action. They are entitled to assert their own rights but not the rights of other, absent parties, who may well not wish to be free of core political speech and who have been given no opportunity to opt out of the speech-suppressing system advocated by plaintiffs.

III. IF THIS COURT DETERMINES THAT THE MATTER IS JUSTICIABLE AND AGREES WITH PLAINTIFFS ON THE MERITS, APPROPRIATE REMEDY IS REMAND FOR FURTHER DISCOVERY AND TRIAL.

The Circuit Court granted summary judgment for defendant and defendant-intervenor. The appropriate remedy, should this Court decide that the trial court erred in granting this summary judgment, is to remand the case to the Circuit Court for further proceedings, including trial. In the current posture, the losing side on summary judgment is entitled to presumptions regarding the truthfulness of its undocumented allegations below. There, Delk sought discovery to rest the accuracy and foundation for those assertions, but plaintiffs refused to answer. The granting of summary judgment in favor of Delk had the effect of cutting off the discovery dispute. Upon remand, Delk would proceed with discovery to determine the foundation for plaintiffs' contentions regarding their standing to bring these claims. Unlike the McCall plaintiffs in ***League of Oregon Cities***, *supra*, who were found to have standing, here plaintiffs submitted no affidavits with "details concerning how, specifically" they were affected by the opportunity for Delk and others to collect signatures on Petition 8.

Dated: January 30, 2006

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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

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Dated: January 30, 2006

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