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**

PETITION FOR REVIEW OF DAVID DELK (DEFENDANT-INTERVENOR-RESPONDENT)

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

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

PETITIONER ON REVIEW INTENDS TO FILE A BRIEF ON THE MERITS

(continued ...)

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Pursuant to Rule 9.05, Oregon Rules of Appellate Procedure, Defendant-Intervenor-Respondent David Delk petitions for review of the Court of Appeals Opinion, dated April 26, 2006 (attached, with pagination by Westlaw). Delk contends that the Court of Appeals erred in construing or applying the law.

Defendant-Respondent Bill Bradbury [hereinafter "Defendant Bradbury" or "Secretary of State"] filed a Petition for Review of this same Opinion on June 28, 2006.

HISTORICAL AND PROCEDURAL FACTS

After the Court of Appeals issued its Opinion on April 26, 2006, Plaintiffs-Appellants Meyer and Fidanque filed a series of emergency motions and amended emergency motions in the Court of Appeals, seeking an order stopping the Secretary of State from processing the signature sheets on Petition 8, despite the fact that a decision by the Court of Appeals is not effective until the opportunity for review by the Oregon Supreme Court has been exhausted. These motions were opposed by Defendant Bradbury and Defendant-Intervenor-Respondent David Delk [hereinafter "Delk" or "Chief Petitioner"]. The Court of Appeals denied these motions on July 5 and July 18, 2006.

On June 28, 2006, the Court of Appeals denied the Petition for Reconsideration filed by Delk, without discussion. On July 28, 2006, the Secretary of State announced that Petition 8 qualified for the November 2006 general election ballot, sufficient valid signatures of Oregon voters having been submitted and verified.

LEGAL QUESTIONS PRESENTED ON REVIEW

The legal questions and proposed rules of law are presented in outline format. Delk adopts the first and second legal questions presented in the Petition for Review filed by Defendant Bradbury.

I. 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.

II. 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.

III. DOES A VOTER HAVE STANDING TO BRING A CHALLENGE BASED UPON AN ALLEGED VIOLATION OF ARTICLE XVII, SECTION 1, PRIOR TO THE ENACTMENT OF THE PROPOSED INITIATIVE?

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

IV. 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 IP 8 would amend both that Petition 8 amends 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).

WHY THE LEGAL QUESTIONS PRESENTED HAVE IMPORTANCE BEYOND THE PARTICULAR CASE AND REQUIRE DECISION BY THE SUPREME COURT

Initiative Petition 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.

The legal questions have importance far beyond this particular case. If such a simple proposed change to the Oregon Constitution 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.

Delk noted at oral argument that the structure of IP 8 is similar to that of Measure 86 (2000), which enacted Article IX, Section 14. 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 simple statute.

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.[1] 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.

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1. 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.

1. THIS CASE PRESENTS SIGNIFICANT ISSUES OF LAW.

The Court of Appeals Opinion relies for its "closely related" determination upon a rationale that was not made by any of the parties. Plaintiffs 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 at any stage of this case that IP 8 would "shift[] 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 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 created a rationale that was never expressed by any of the parties. A search of the briefs shows the expression of no such rationale or any rationale even remotely similar to that adopted by the Court of Appeals.

Whether or not the people may amend the Oregon Constitution by means of a one-sentence amendment, without contravening Article XVII, section 1, is clearly a very

significant issue and should be decided on the basis of rationales that have been presented and argued by the parties.

2. MANY PEOPLE ARE AFFECTED BY THE DECISION IN THE CASE.

All of the people of Oregon, and elsewhere, are affected by the decision, as IP 8 would allow the enactment of campaign finance limitations that would be applicable to all persons and entities. Also affected are those who put forth the effort to qualify IP 8 for the ballot. The Appendix of Intervenor (App-9) includes an article from THE OREGONIAN noting that this effort included the submittal of 280,000 voter signatures and $300,000 in contributions from more than 1,200 contributors, not to mention the 650 volunteer circulators.[2] Not reviewing the Opinion would cause irreparable harm to the Chief Petitioners and all circulators and supporters of the initiative.

3. THE ISSUE IS ONE WHICH WOULD BENEFIT FROM FURTHER GUIDANCE BY THIS COURT, AS THE COURT OF APPEALS BELIEVES THAT PRECEDENTS ARE INCONSISTENT.

The Court of Appeals Opinion stated:

> The Supreme Court has offered little guidance about what it means for provisions to be "closely related." In ***Lincoln Interagency Narcotics Team v. Kitzhaber***, 188 Or App 526, 72 P3d 967 (2003), rev. allowed, 336 Or 376, 84 P3d 1080 (2004) (***LINT***), this court reviewed all of the Supreme Court cases applying the "closely related" analysis. A repetition of that review would not aid our analysis here. We note only that, since ***Armatta***, the Supreme Court has provided only one example of provisions that are "closely related." See ***Hartung v. Bradbury***, 332 Or 570, 33 P3d 972 (2001). In ***LINT***, this court was unable to reconcile that example with other Supreme Court precedents.

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2. The magnitude of these efforts has been documented in the record by two affidavits by the Treasurer of the relevant campaign finance committees. These numbers include the signatures on IP 37, the proposed detailed campaign finance reform statute, which was circulated with IP 8 and also qualified for the ballot.

Meyer v. Bradbury, 205 Or App 297, 308 n5, 134 P3d 1005, 1011 n5 (2006). Thus, the Court of Appeals itself appears to invite additional guidance on the key legal issue it decided, having been unable to reconcile existing precedents.

4. THE OTHER FACTORS.

The legal issues are properly preserved. The record presents the desired issues. The issues are well presented in the briefs, except that the crucial rationale adopted by the Court of Appeals did not appear in the briefs. The Court of Appeals decision appears to be wrong, would cause serious and irreversible injustice, and cannot be corrected by another branch of government. No amicus curiae has appeared. If review is granted, the Supreme Court should probably expect amicus briefs from various of the many organizations that support or oppose IP 8.

ARGUMENTS CONCERNING THE LEGAL QUESTIONS

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

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. ***Ecumenical Ministries v. Oregon State Lottery Commission***, 318 Or 551, 560, 871 P2d 106

(1994). The ordinary meaning of "necessary" is not "sufficient." 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.

But let us assume for a moment that "necessary" in Article I, Section 25(1), 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").

II. 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?

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.

In addition, the Court of Appeals put the burden of proof 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 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.

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

The Opinion (p. 7) several times characterizes IP 8 as a limitation on legislative authority, when the opposite is true. As noted also by Defendant Bradbury, IP 8 constitutes solely a limited expansion of legislative authority.

The Opinion (p. 7) states: "Thus, under IP 8, the legislature would be prohibited from passing such laws, except by a three-fourths majority." 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.

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.[3] 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.[4]

Article IV, Section 25(1), does not establish that the Legislature can enact bills prohibiting or limiting political campaign contributions or expenditures by simple majority votes. Thus, IP 8 is in not a limitation on legislative power. It is a specific expansion of legislative power, allowing the Legislature to enact, by 3/4 votes of both houses, a type of bill that currently the Legislature has no power to enact at all, due 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.

A necessary conclusion of the Opinion's analysis is that the Oregon Constitution can never be amended to grant new 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 <u>limited</u> power to the Legislature must be done with at least

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3. If IP 8 did not have the 3/4 vote requirement, it would represent a <u>larger</u> change to the Oregon Constitution, as it would make it <u>easier</u> for the Legislature to enact campaign finance limitation statutes than the IP 8 chief petitioners desire. Thus, the 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 but be allowed to consider a larger change to the Oregon Constitution on precisely the same subject.

4. At oral argument, Delk presented an exhibit (included in the Appendix, 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.

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).

B. 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 want a system of campaign finance reform that can be changed by simple majority vote of the Legislature, based on the historical examples of Massachusetts and Ohio 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 which may be enacted by initiative.

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

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

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

In addition, after oral argument in this case, the Secretary of State, upon advice of the Attorney General, began refusing to provide ballot titles for any initiative petition conditioned upon another initiative petition for its effectiveness.[5] Plaintiffs-Appellants 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-Appellants suggested that each amendment would condition its effectiveness upon the adoption of the other amendment.

On February 2, 2006, however, 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 effectiveness, then they are not "measures" under Article IV at all.[6] Thus, it would not be possible to offer IP 8 by means of two separate changes to the Oregon Constitution, as the Attorney General does not recognize such dependent proposals as "measures" that can qualify for signature gathering in the first place.

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

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

III. DOES A VOTER HAVE STANDING TO BRING A CHALLENGE BASED UPON AN ALLEGED VIOLATION OF ARTICLE XVII, SECTION 1, PRIOR TO THE ENACTMENT OF THE PROPOSED INITIATIVE?

The Opinion (p. 3) 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"].

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.[7] 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 proposed law or amendment to the constitution." The basis for plaintiffs' challenge to Initiative Petition 8 ["IP 8"], however, is not Article IV but 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.

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7. 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.

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.

No party cited any Oregon Supreme Court case allowing pre-enactment review of an initiative for alleged violation of Article XVII, section 1. See Delk Response on Justiciability, pp. 6-12, particularly the discussion from ***State ex rel Keisling v. Norblad***, 317

Or 615, 633-35, 860 P2d 241 (1995). Every case cited in the Opinion involved pre-enactment review solely under Article IV, which were subject to the 1968 statutory exception noted in ***OEA v. Roberts***. The Legislature has not enacted a similar exception for challenges based on Article XVII, section 1.

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).

Dated: August 2, 2006

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served two true copies of the foregoing PETITION FOR REVIEW OF DAVID DELK (DEFENDANT-INTERVENOR-RESPONDENT) by first class mail to all parties listed below, deposited in the U.S. Postal Service at Portland, Oregon, with first class postage prepaid.

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Dated: August 2, 2006

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