IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

BRYN HAZELL, FRANCIS NELSON, TOM CIVILETTI, DAVID DELK, GARY DUELL, JOAN HORTON, and KEN LEWIS,

Plaintiffs,

v.

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

and

HARDY MYERS, Attorney General of the State of Oregon,

Defendants.

and

CENTER TO PROTECT FREE SPEECH, INC., an Oregon not-for-profit corporation, and FRED VANNATTA,

Intervenor-Defendants and Cross-Claimants.

Case No. 06C22473

INTERVENOR-DEFENDANTS/ CROSS-CLAIMANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' AND DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND REPLY MEMORANDUM IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT

1. Introduction

This Court does not need to decide the dispute between plaintiffs and defendants about whether the Oregon Constitution permits limits on campaign contributions and

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expenditures. The very fact that Measure 47 requires this Court to decide whether conditions exist to make the measure effective demonstrates why, under Article I, section 21 of the Oregon Constitution, the entire measure is void.

2. Intervenors' Claims are Justiciable Now

This contention is not, as defendants argue, too "remote" for intervenors to assert. Defendants claim that "[u]ntil something brings—or at least concretely threatens to bring—Measure 47 into operative effect, there is no ripe controversy for this court." Defendants' Memorandum, p. 25. But that concrete "something" is present in this case: plaintiffs seek an order directing defendants to "administer and enforce all provisions of Measure 47." Complaint, p. 9, ¶ 2. According to Mr. VanNatta's uncontroverted testimony, intervenors are parties against whom, if plaintiffs prevail, defendants would administer and enforce Measure 47 (Declaration of Fred VanNatta, ¶ 2). Therefore, intervenors have demonstrated the exact interest required of a person to assert a claim for relief under ORS 28.020. *See*, *e.g., Budget Rent-A-Car v. Multnomah Co.*, http://66.161.141.176/cgi-bin/texis/web/orcaselaw/bvindex.html?dn=287+Or.+93&sid=66b9ec6b5bd9295c0000f34a82fcc 50f287 Or 93, 95–96 (1979) (party has standing under Declaratory Judgment Act when challenged law, if valid, would require party to take actions).[1]

Intervenors' interest in the invalidity of Measure 47 is stronger than the interest found sufficient to permit a challenge to the validity of Measure 7 (a precursor to Measure 37 that, if permitted to have taken effect, would have required governments to pay private property owners when a regulation restricted the use of property and reduced its value). In *League of Oregon Cities v. State of Oregon,* http://66.161.141.176/cgi-bin/texis/web/orcaselaw/bvindex.html?dn=334+Or.+645&sid=66b9ec6b5bd9295c0000f34a82fc

[1] Curiously, defendants do not claim that the Horton plaintiffs lack standing to bring their claims even though the Horton plaintiffs alleged injury flows not from Measure 47's application to them, but from the failure of the measure to apply to intervenors. *See* Defendants' Memorandum, p. 25, n15.

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c50f334 Or 645, 660–61 (2002), the Supreme Court found adequate to invoke ORS 28.020 as the basis for jurisdiction the assertion by a plaintiff landowner that, if Measure 7 were to take effect, neighboring landowners *might* request and *might* receive permission to develop their properties, "*possibly* [for] commercial use"–actions that, *if* taken, would devalue the plaintiff's property. Intervenors' claims are not based upon concern that others may take advantage of Measure 47 to intervenors' disadvantage; intervenors' interest is that they will be the persons against whom Measure 47 is to be enforced.[2]

3. Voters Understood "Effective" to Mean "Effective," Not "Operative"

Defendants argue that, when adopting Measure 47, voters intended for the term "effective" to mean "operative" because, in *Fouts v. Hood River*, 46 Or. 492 (1905), and *State v. Hecker*, 109 Or. 520 (1923), the Supreme Court appears to have treated the Legislative Assembly's use of the term "effective" to mean "operative." Defendants' Memorandum, pp. 26-27. This argument might have some force if the voters whose intention mattered were voters of 1926, but the intention for this Court to discern is of voters of 2006—voters for whom the term "effective" cannot have meant "operative." For evidence of voters' understanding of a term, the courts are to look to sources that are "contemporaneous" with the election in which the voters considered the measure. *Ecumenical Ministries v. Oregon State Lottery Comm.,* 318 Or 551, 560

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[2] Intervenors, therefore, assert more than an abstract interest in the application of a law. However, even if intervenors asserted nothing more than a bona fide challenge to the state's interpretation of Measure 47, that interest would be enough to permit this Court to rule. *Gortmaker v. Seaton,* 252 Or 440, 443 (1969), does not stand for the proposition that uncertainty over the effect of a law is an insufficient basis for a claim under ORS 28.020. The very purpose of ORS 28.020 is to permit a "determine[ation on] any question of construction or validity arising under any such *** constitution[or] statute[.]" In *Gortmaker*, the court appeared to believe that the district attorney's claimed need for a declaration was specious, calling his "statements of law *** open to serious question." 252 Or at 443. On the other hand, there may be a concrete chilling effect on electors and other participants in the electoral process from the fear that a law such as Measure 47 that imposes penalties virtually unlimited in amount will suddenly spring to life. Judges in this state acknowledge as an interest worth protecting that there can be "a chilling effect on those innocent participants who contribute monies or who otherwise participate in promotion of ballot measures, whether it be in support of a ballot measure sponsored by defendants or by other political committees and individuals who wish to participate in the political process." *American Federation of Teachers-Oregon v. Oregon Taxpayers United Pac*, 208 Or App 350, 396 (2006) (Edmunds, J. concurring in part and dissenting in part).

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n8 (1994).

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In the 1920s, a "bimbo" meant a tough guy and eyeglasses were "cheaters"; neither of those terms bears the same meaning today.[3] And, just as the vocabulary of Scott Turow differs from the vocabulary of Scott Fitzgerald, the vocabulary of legislative measures is different now than it was generations ago.

When interpreting legislation, a court must give effect to "a deliberate choice of words[.]" *Gen. Elec. Credit Corp. v. Tax Com.,* http://66.161.141.176/cgi-bin/texis/web/orcaselaw/bvindex.html?dn=231+Or.+570&sid=ba0fcf64bffc37695682eb7ec6f09 162231 Or 570**,** 594 (1962). Since the days of *Fouts* and *Hecker*, drafters of legislation, whether members of the Legislative Assembly or of the public, have used "effective" when they meant "effective" and "operative" when they meant "operative." As set forth at pages 10 to 13 of Intervenors' Motion for Summary Judgment, drafters no longer use "effective" to mean "operative." In fact, The bill Drafing Manual[4] that the Legislative Assembly follows *requires*the use of "operative" instead of "effective" when an initiative Act is made contingent upon a change in the constitution:

> Enabling legislation prepared at the same time as a constitutional amendment or revision must include a provision in the enabling Act to the effect that if the constitutional amendment or revision is not approved by the people at the election at which it is to be submitted, the enabling Act is not effective. *If the enabling legislation is to be adopted by initiative, the provision should indicate that the enabling legislation does not become "operative"*

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[3] For these (and many other changes) in the meaning of words from the 1920s to today, *see* http://www.fcps.edu/westspringfieldhs/academic/english/1project/99gg/99gg4/language.htm and http://local.aaca.org/bntc/slang/slang.htm.

[4] Bill Drafting Manual, p. 17.11 (Office of Legislative Counsel 2006)(emphasis added). The Bill Drafting Manual read the same way when Measure 47 was drafted and adopted.

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unless the accompanying constitutional amendment or revision is approved by the people (because section 1 (4)(d), Article IV, Oregon Constitution, says that an initiative law becomes effective 30 days after the election at which it is approved).

The history of the adoption of Measure 47 also shows that voters understood "effective" to mean "effective," not "operative." First, information on which voters relied referred to Measure 47 as "becom[ing] law," not becoming "operative." For example, the Voters' Pamphlet informed voters that "[s]upporters wrote Measure 46 to allow the otherwise unconstitutional provisions in Measure 47 to *become law*"[5] and that voters would "have to surrender [their] existing constitutional rights through Measure 46 for Measure 47 to even be able *to take effect*."[6] From *The Oregonian*, voters knew that Measure 47 "would *become law* only if voters approve both it and Measure 46."[7]

Supporters of Measure 47 also told voters that adopting Measure 46 was imperative, not just beneficial—a position that supporters would not have taken if Measure 47 could become law despite the failure of Measure 46: "Measures 46 and 47 must both be passed, because they work together."[8] Opponents made the same point:

1. "Measures 46 and 47 *** are designed to work together[.]"[9]
2. "[The] limits [in Measure 47] could not be imposed without Measure 46 taking away the Constitutional protections on freedom of speech[.]"[10]
3. "Even its sponsors admit that Measure 47 violates your existing free

[5] Argument in Opposition to Ballot Measure 46 by American Federation of Teachers-Oregon (Official Voters' Pamphlet, General Election, Nov. 7, 2006) (emphasis added).

[6] Argument in Opposition to Ballot Measure 47 by SEIU Local 49 and SEIU Local 503, OPEU (Official Voters' Pamphlet, General Election, Nov. 7, 2006) (emphasis added).

[7] "Measures promise volatile shift in Oregon campaign spending," http://www.oregonlive.com/elections/oregonian/index.ssf?/base/news/1158980195219080.xml&coll=7 (Sept 23, 2006).

[8] Argument in Favor of Ballot Measure 46 by Jackson County Citizens for the Public Good (Official Voters' Pamphlet, General Election, Nov. 7, 2006).

[9] Argument in Opposition to Ballot Measure 46 by Oregon School Employees Association (Official Voters' Pamphlet, General Election, Nov. 7, 2006).

[10] Argument in Opposition to Ballot Measure 47 by Planned Parenthood Advocates of Oregon (Official Voters' Pamphlet, General Election, Nov. 7, 2006).

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speech rights. That's why they also are asking for you to surrender those rights by constitutional amendment (Measure 46)."[11]

4. Measure 47 is Void

As explained above, Intervenors agree with the Horton plaintiffs that Measure 47 violates the Oregon Constitution because section 9(f) "purports to hinge the effectiveness of some parts of Measure 47 upon a vague and presently unforeseeable contingency." Horton Plaintiffs' Memorandum, p. 3. Where intervenors and the Horton plaintiffs part company is on the effect of this "vague and presently unforeseeable contingency prescribed by section 9(f)." As defendants point out, the Horton plaintiffs "offer no controlling authority *** in support of the proposed definiteness requirement" that section 9(f) violates[12]; neither do the Horton plaintiffs point to any language in the Oregon Constitution that renders section 9(f) invalid.

The Horton plaintiffs appear to have shied away from the logical constitutional standard—Article I, section 21, which prohibits laws "the taking effect of which shall be made to depend upon any authority"—because the consequence of making the effectiveness of a law depend upon a future constitutional amendment or interpretation is *the invalidation of the entire law*.

This Court cannot, as both sets of plaintiffs suggest, sever section 9(f) from Measure 47. A measure must be lawfully adopted before the measure's severability provision can come into play. *Armatta v. Kitzhaber*, http://66.161.141.175/cgi-bin/texis/web/orcaselaw/bvindex.html?dn=327+Or.+250&sid=2d46e510f825f9a31f7acbe998c4d2ec327 Or 250, 285 n19 (1998), explains:

> Because this case concerns the procedural requirements for amending or revising the constitution, the question of severability, which was raised as an issue below in relation to plaintiffs'

[11] Argument in Opposition to Ballot Measure 47 by Oregon Education Association (Official Voters' Pamphlet, General Election, Nov. 7, 2006).

[12] Defendants' Memorandum, p 22.

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> "revision" challenge to Measure 40, is not an issue here. Severability relates to a substantive challenge, based upon a superior source of law, to certain provisions of a law or amendment that has been properly enacted or adopted. *Hart v. Paulus,* 296 Or. 352, 361, 676 P.2d 1384 (1984); *see also Oregon State Police Officers' Assn. v. State of Oregon,* 323 Or. 356, 380, 918 P.2d 765 (1996) (in concluding that a constitutional amendment, adopted by initiative petition, violated the Contracts Clause of the United States Constitution, the court applied principles of severability and concluded that no section could be saved). .In contrast, this case concerns "the legality of the enactment [or adoption] process itself." *Hart,* 296 Or. at 361. *See also Lane Transit District v. Lane County,* 327 Or. 161, 169-70, 957 P.2d 1217 (1998) (stating that the severability clause in the measure at issue "is (and would have to be) aimed at judicial construction of the measure after (and if) *** it is adopted").

A contingent effective clause is not a substantive provision; the effective clause is part of the enactment process:

> Enabling legislation prepared at the same time as a constitutional amendment or revision must include a provision in the enabling Act to the effect that if the constitutional amendment or revision is not approved by the people at the election at which it is to be submitted, the enabling Act is not effective.

Bill Drafting Manual, p. 17.11 (Office of Legislative Counsel 2006). There are two principal benefits fostered by this requirement to make a contingent measure *not* take effect upon the failure of the constitutional change on which the measure relies. First, the measure complies with Article I, section 21. Second, the state of the state's law is certain: A measure does not float on the wind like a spore waiting until such time as a group of judges may decide that conditions are ripe for the spore to grow.

Therefore, when an Act violates Article I, section 21, the result is the invalidation of the entire measure. *General Electric Co. v. Wahle*, 207 Or 302, 333 (1956) (Act is "unconstitutional and void, being in violation of *** Art. 1, § 21"); *LaForge v. Ellis*, 175 Or 545, 554 (1945) ("the challenged act is unconstitutional and void"); *Van Winkle v. Meyers*, 151 Or 455, 470 (1935) (violation of Article I, section 21 "in itself alone *** render[s] the act void"); *State ex rel Bissinger & Co. v. Hines*, 94 Or 607, 617 (1920) (because in violation of Article I,

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section 21, "the act *** is unconstitutional and void"); *Portland v. Coffey*, 67 Or 507, 515 (1913) (invalidating entire Act when "the validity of the enactment [wa]s to depend upon a decision of the Supreme Court").

Invalidation makes sense for two reasons, even in the face of a severability clause. First, invalidating the entire measure avoids the "'chicken or the egg?' conundrum." The severability provision through which plaintiffs seek to write out section 9(f) can only be used if this Court writes section 9(f) out of the measure.

Second, severing a contingent effective clause necessarily ignores voters' intent that Measure 47 not take effect unless the terms or interpretation of the constitution changed. Voters were repeatedly told that Measures 46 and 47 worked in tandem: "Measures 46 and 47 must both be passed, because they work together."[13] Virtually every argument for or against the measures referred to both of them: "Measures 46 and 47, together[,]" "Measures 46 and 47—working in concert[,]"[14] and "Measure 46 is paired with *** Measure 47."[15] It is hard to conceive of a result more contrary to voters' expectations than breaking up the pair.

Suppose a law read:

> Section 1. The state shall pay every resident $1 million.
>
> Section 2. Section 1 takes effect only if Bill Gates gives all of his money to the state.
>
> Section 3. If any section of this Act is declared unconstitutional, the court shall sever that section.

Suppose that section 2 is found to be unconstitutional. Under the plaintiffs' theory of severability, everyone in Oregon gets $1 million. That cannot be the intent there or, by analogy, with Measure 47.

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[13] Argument in Favor of Ballot Measure 46 by Jackson County Citizens for the Public Good (Official Voters' Pamphlet, General Election, Nov. 7, 2006).

[14] Argument in Opposition to Ballot Measure 46 by Oregon School Employees Association (Official Voters' Pamphlet, General Election, Nov. 7, 2006).

[15] Argument in Opposition to Ballot Measure 46 by Stand for Children (Official Voters' Pamphlet, General Election, Nov. 7, 2006).

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5. Conclusion

The supporters of Measure 47 could have drafted the measure to have become "operative" rather than "effective." The result of their failing is that they presented to voters that voters could not validly adopt. As a result, this Court should declare that Measure 47 is void.

DATED this 30th day of March, 2007.

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