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. 06C-22473
Honorable Mary Mertens James

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' AND INTERVENORS' MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION

This case involves a statutory ballot initiative that was validly approved by the people in 2006 but which—by its terms—will become operative in the future only if the Oregon Constitution is amended or reinterpreted in a pertinent manner.

As of the date of the 2006 general election, the Oregon Constitution precluded any limitations on campaign contributions and expenditures (CC&Es). Proponents of two 2006 ballot measures sought to authorize and simultaneously to enact CC&E limits. Thus, Measure 46 proposed an amendment to remove the existing state constitutional impediment to CC&E limits. In turn, Measure 47 proposed to enact statutory CC&E limits, as well as other related requirements, applicable to candidate-election campaigns.

Measure 47 further provided for the contingency that the Oregon Constitution still might not permit CC&E limits on its effective date. In that event, Measure 47 directed that it nevertheless should be codified and become effective at such time as the Oregon Constitution does permit CC&E limits.

At the election, the people rejected the proposed constitutional amendment but approved Measure 47, the statutory initiative. The central issues in this case, therefore, concern the validity and effect of the provision placing Measure 47 in abeyance in the event that CC&E limits are not permitted on its effective date.

The constitutional challenges to that provision founder on the distinction between a statute's *effective date*—which is constitutionally mandated—and a statute's *operative effect*. Oregon Supreme Court precedent amply supports the legislative prerogative to defer a statute's operative effect. Applying controlling Oregon Supreme Court precedent, Measure 47's contingent-effectiveness provision should be construed and upheld as an exercise of that recognized authority. Moreover, giving effect to the plain terms of that provision, Measure 47 should be codified and otherwise held in abeyance at this time.

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BACKGROUND

I. A historical synopsis on CC&E limits under the Oregon Constitution.

At the general election in 1994, the people of Oregon approved Measure 9, which sought to impose specific limitations on campaign contributions in candidate elections. Oregon Laws 1995, ch. 1, §§ 3, 4, 16; *see also Vannatta v. Keisling*, 324 Or. 514, 537, 931 P.2d 770 (1997). Various petitioners brought facial challenges to those limitations under Article I, § 8 of the state constitution. *Vannatta*, 324 Or. at 517.

The *Vannatta* court first reviewed its earlier campaign-finance decision in *Deras v. Myers*, 272 Or. 47, 535 P.2d 541 (1975). That case involved a challenge under Article I, § 8 to two statutes that restricted campaign expenditures. The *Deras* court applied a "balancing" analysis, similar to that required under the First Amendment, and concluded that the expenditure limitations were unconstitutional. *See Vannatta*, 324 Or. at 519.

Following *Deras*, however, the Oregon Supreme Court established a jurisprudence under Article I, § 8 that is independent of the federal First Amendment analysis, and which eschews all balancing. Given that intervening development, the *Vannatta* court concluded that *Deras* "provides little assistance[.]" *Id*. at 520.

Turning to Measure 9, the *Vannatta* court agreed with the State's concession that campaign *expenditures* are protected expression. *Id*. The State sought, however, to distinguish campaign *contributions* and to argue that those are not expressive. *Id*.

The Supreme Court rejected the distinction between contributions and expenditures, holding that "the contribution, in and of itself, is the contributor's expression of support for the candidate or cause—an act of expression that is completed by the act of giving[.]" *Id*. at 522. Furthermore, viewed in the proper light, "expenditures and contributions can be better seen for what they are—not opposite poles, but closely related activities." *Id*. at 524. Thus, "both

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campaign contributions and expenditures are forms of expression for the purposes of Article I, section 8." *Id*.[1]

Under Article I, § 8, the court therefore undertook to determine whether the statute was directed at expressive conduct on the one hand, or whether it was directed at a separate proscribable harm, on the other hand, with only incidental effects on expression. *See id.* at 536. If a statute targets a separate proscribable harm, it may pass muster under Article I, § 8, provided it survives overbreadth analysis. *Id*.

Measure 9's chief petitioners argued the court should infer that the measure was directed at the harm of "undue influence" in the political process. *Id*. at 539. The court acknowledged that it properly may infer the harm to which a statute is directed in certain circumstances. It had done so, for example, in *State v. Stoneman*, 323 Or. 536, 920 P.2d 535 (1996), where it upheld a statute criminalizing child pornography. Although that statute did not expressly identify the separate harm to which it was directed, the *Stoneman* court inferred that the statute was intended to prevent child abuse. *See Vannatta*, 324 Or. at 538. Further, the court sustained the statute as a regulation of that separate harm. "Of paramount importance" to the *Stoneman* decision were two facts: (1) that "child abuse is a harm that properly is subject to government proscription;" and (2) that "such abuse necessarily had to occur in order to produce" the material criminalized by the statute. *Id*. (describing the *Stoneman* decision).

But the Supreme Court found that neither of those critical factors from *Stoneman* was present in *Vannatta*. *Id*. The court explained, "[I]t is not sufficient to select a phenomenon and label it as a 'harm.'" *Id*. at 539. The harm must instead be one that the legislative power is authorized to restrict or prohibit. And where expressive conduct is involved, the legislature's target must be clear, that target must be a permissible subject of regulation, and the means chosen to address it must not spill over into interference with other expression. *Id*.

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[1] The *Vannatta* court further held that such expression would be protected also under: Article I, § 26; Article II, § 1; and Article IV, § 1(2). *Id*. at 522-23.

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Applying those standards, the Supreme Court rejected the contention that it could sustain Measure 9 as a regulation of undue influence, as a separate harm. Instead, the court held the restrictions targeted speech. *Id*. at 540.

Thus, the measure could be sustained only if its speech restriction was within a recognized historical exception or if it fit within an "incompatibility" exception. No historical exception was suggested by any party. Further, the court flatly rejected the argument that campaign contributions were incompatible with political campaigns. *Id*. at 540-41. It therefore struck down Measure 9's contribution limits. *Id*. at 541.[2]

The Oregon Supreme Court recently had occasion to reiterate its *Vannatta* holding in *Meyer v. Bradbury*, 341 Or. 288, 142 P.3d 1031 (2006). There, the court considered a pre-election challenge to Measure 46, the twin measure to the one at issue in this case. The petitioners contended that Measure 46 violated the separate-vote requirement of Article XVII, § 1, because the measure allegedly would change two or more provisions of the constitution, and because the changes were not closely related. *Cf. Armatta v. Kitzhaber*, 327 Or. 250, 959 P.2d 49 (1998) (setting forth analytical framework under separate-vote requirement). The petitioners argued, *inter alia*, that Measure 46 would change Article I, § 8, with respect to state constitutional protection for CC&Es.

The Supreme Court agreed that Measure 46 would change Article I, § 8, explaining that *Vannatta* "held that *Article I, section 8*, prohibits laws restricting campaign expenditures and contributions." *Meyer*, 341 Or. at 293 n. 4. The *Meyer* court later expanded upon that proposition:

[2] The petitioners in *Vannatta* also challenged various provisions related to campaign expenditures. The Supreme Court disagreed, however, with their fundamental contention that Measure 9 imposed any limits on campaign expenditures. *See id.* at 542-45.

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> Under Oregon law, both campaign contributions and expenditures are forms of expression protected by [Article I, section 8], thus making legislatively imposed limitations on individual political campaign contributions and expenditures impermissible. *See Vannatta* * * * (so holding).

Id. at 299.

Thus, under the controlling precedents of *Vannatta* and *Meyer*, CC&Es are protected expression in Oregon, and limitations on CC&Es are categorically unconstitutional.

II. The 2006 ballot measures related to CC&E limitations.

At the general election in 2006, the ballot included two initiatives related to CC&Es. Measure 46 proposed a constitutional amendment; Measure 47 proposed a statute.

A. Measure 46.

The proposed constitutional amendment, Measure 46, was relatively simple. In effect, it proposed to remove any constraint under the Oregon Constitution with respect to CC&E limits, whether such limits might be enacted by the Legislative Assembly or by the people through their reserved legislative power.[3] Under Measure 46, statutory CC&E limits in Oregon would be constrained by federal law, but not by the Oregon Constitution.

At the 2006 general election, Measure 46 was rejected. Thus, Article I, § 8, of the Oregon Constitution still prohibits CC&E limits, as resolved in *Vannatta* and *Meyer*.

B. Measure 47.

Anticipating state constitutional authorization, Measure 47 proposed statutory CC&E limits, as well as other requirements. The measure included a severability clause. Measure 47, § (11). But it also included a provision limiting its own operation *in toto*:

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[3] The full text of Measure 46 is 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 an election."

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> If, on the effective date of this Act, the Oregon Constitution does not allow limitations on political campaign contributions or expenditures, this Act shall nevertheless be codified and shall become effective at the time that the Oregon Constitution is found to allow, or is amended to allow, such limitations.

Measure 47, § (9)(f).

The people approved Measure 47.

III. The Secretary of State's determination with respect to Measure 47.

Measure 47 assigns the Secretary of State several responsibilities in his role as chief elections officer for the State. Accordingly, it fell to the Secretary of State, in the first instance, to determine whether any of Measure 47's substantive provisions were operative in light of § (9)(f).

On November 17, 2006, the Secretary of State issued his written determination that, under the plain terms of Measure 47, the Act as a whole should not become operative until the Oregon Constitution is found or amended to permit CC&E limits. Because neither of those contingencies has yet occurred, the Act as a whole, by its own terms, remains dormant until one of those preconditions for its operative effect is realized. *See* Complaint, Ex. B (Secretary of State's determination letter). The Attorney General concurs with that interpretation.

IV. The complaint and cross-claim in this case.

The complaint in this case asserts parallel pairs of claims on behalf of two discrete sets of plaintiffs.

The first pair of claims—the first and second claims for relief—are asserted by plaintiffs Hazell, Nelson, Civiletti, Della, and Duell (the Hazell plaintiffs). Those plaintiffs seek a declaration and injunction that defendants must implement Measure 47 in its entirety. The Hazell plaintiffs maintain that § (9)(f), properly understood, does not preclude defendants from implementing and enforcing the balance of the measure immediately.

The second pair of claims—the third and fourth claims for relief—are asserted by plaintiffs Horton and Lewis (the Horton plaintiffs). Those plaintiffs argue that § (9)(f) is itself

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unconstitutional. That invalid provision should be severed, they contend, and the balance of the measure should be immediately operative. The Horton plaintiffs seek declaratory and injunctive relief requiring immediate implementation and enforcement of the balance of Measure 47, excepting § (9)(f).

Intervenors sue defendants on a cross-claim. That cross-claim seeks a declaration that Measure 47 is void on the ground that its effectiveness "is made to depend upon an authority other than as provided in the state constitution in violation of Article I, section 21 of the state constitution." Answer and Cross-Claim, ¶ 9.

V. Standards for interpreting statutory measures.

The legal issues in this case largely focus on interpretation of Measure 47, a statute that was enacted through the initiative. In interpreting such legislation, the court's role is to discern the intent of the voters, looking first to the text and context of the measure. *See Fremont Lumber Co. v. Energy Facility Siting Council*, 331 Or. 566, 574 (2001); *State v. Guzek*, 322 Or. 245, 265 (1995) (citing *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Or. 606, 610 (1993) (*PGE*)). The legislative history of a statute generally is considered only if the provision's text and context indicate ambiguity. *See PGE,* 317 Or. at 611. Where the legislative history of a ballot measure is at issue, courts look to contemporaneous indicia of voter intent, such as voters' pamphlet information and newspaper articles and editorial comment. *State v. Anderson*, 208 Or. App. 409, 417 n. 7, 145 P.3d 245 (2006); *see also Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or. 551, 559 n. 8 (1994) (interpreting initiated constitutional amendment).

VI. Standard of review.

The issues in this case are presented on cross-motions for summary judgment. A motion for summary judgment should be granted if there is no genuine issue of material fact, and the

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moving party is entitled to judgment as a matter of law. ORCP 47. The issues presented are purely legal, going to statutory interpretation and to constitutional analysis.[4]

ARGUMENT

I. Plaintiffs are not entitled to relief on their complaint.

A. Measure 47's plain terms place it in abeyance, pending authorization.

At bottom, the meaning and proper application of § (9)(f) in this case is a matter of statutory construction. As set forth above, a court interpreting an initiated statute should look first to the text and context of the provision at issue. Insofar as the text and context may be ambiguous, the court should then turn to the history of the measure, including voters' pamphlet information and contemporaneous newspaper items.

The text of § (9)(f) describes a condition, then mandates the consequences if that condition obtains. The condition triggering § (9)(f) is that "on the effective date of this Act, the Oregon Constitution does not allow [CC&E limits]." The mandated consequence if that condition obtains is that the "Act shall nevertheless be codified and shall become effective at the time that the Oregon Constitution is found to allow, or is amended to allow, such limitations." As discussed below, the triggering circumstances unambiguously exist, and the unambiguous consequence is that Measure 47, in its entirety, presently is not operative. Furthermore, if resort to legislative history were appropriate, the history of Measure 47 confirms that interpretation.

1. The text, context, and history of Measure 47 all confirm that § (9)(f) is triggered in the present circumstances.

Section (9)(f) is triggered if, on the measure's effective date, the Oregon Constitution does not allow CC&E limits. There are two plausible interpretations of that triggering language. One interpretation would require analysis of the present validity of CC&E limits under the Oregon Constitution. The other interpretation would hold that Measure 47 itself presumed and

[4] To the extent that the Hazell plaintiffs imply that voter intent is a factual issue (*see* Hazell Plaintiffs' Memo at 2-3), they are mistaken.

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intended that its own operative effect would depend on a constitutional change, such as adoption of Measure 46. The latter offers a subconstitutional ground for decision, based solely on interpretation of the measure itself.

Under either plausible interpretation of the trigger, the result is the same: the trigger is actuated, because the constitution in fact did preclude CC&E limits when Measure 47 was proposed, and that status quo has not been disturbed. Both of those plausible interpretations are addressed below, as is plaintiffs' interpretation of § (9)(f)'s trigger.

a. Measure 47 itself presumes the necessity of an authorizing constitutional change.

Looking first to the text of the measure, § (9)(f) does not itself expressly declare whether a constitutional change—such as adoption of Measure 46—would be necessary to bring Measure 47 into operation. Section (1)(r), on the other hand, does seems to presume and intend that a constitutional change would be necessary.

That section describes the enactment in 1994 of "contribution limits similar to those in this Act," and explains that those limits were struck down by the Oregon Supreme Court in 1997. Section (1)(r) then provides, "This Act shall take effect at a time when the Oregon Constitution does allow the limitations contained in this Act." *Id*. That language plainly presumes the invalidity of Measure 47's CC&E limits, pending a pertinent constitutional change.

The relevant context also includes the Oregon Supreme Court precedents, discussed above, construing the state constitution to preclude any statutory CC&E limits. *Meyer*, 341 Or. at 299 (legislatively proposed CC&E limits are "impermissible"); *Vannatta* (same). Those precedents strongly reinforce Measure 47's textual indication that its CC&E limits would be dependent on a constitutional change.

Furthermore, even if the text and context were ambiguous, the legislative history demonstrates that, unless amended, the Oregon Constitution precludes CC&E limitations. For

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example, the certified ballot title for Measure 46[5] explained, "The Oregon Constitution currently bans laws that impose involuntary limits on, or otherwise prohibit, political campaign contributions or expenditures by any person or any entity." Leith Affidavit, Ex. 1, voters' pamphlet information for Measure 46 at 2. The ballot title for Measure 46 informed voters that the result of a "No" vote would be to "retain[] current ban in Oregon Constitution on laws that limit or prohibit campaign contributions or expenditures by any person." *Id*. And the explanatory statement for Measure 46—prepared by a unanimous committee that included plaintiff Hazell and plaintiffs' counsel Meek—informed voters, "At present Article I, section 8, of the Oregon Constitution, the free speech guarantee, does not allow laws that prohibit or impose limits on [CC&Es]." *Id*. at 3.

The voters' pamphlet arguments uniformly delivered the same message. Plaintiff Horton and plaintiff Delk—a chief petitioner for Measure 46—explained in a voters' pamphlet argument supporting Measure 46, "In 1994, 72% of Oregonians voted for limitations on contributions to candidates[,]" but "[i]n 1997, the Oregon Supreme Court threw out that law[.]" *Id*. at 18. Horton and Delk urged, "**Measure 46 is the solution!** It's just one sentence which permits limitations on campaign contributions. *** * * A constitutional amendment is required to allow limitations**." *Id*. (boldface in original). They concluded, "Measure 46 simply makes limitations on [CC&Es] constitutional." *Id*.

Another argument, filed in support of Measure 47, explained that "the Oregon Supreme Court in 1997 struck down [Measure 9], deciding that the *existing* Oregon Constitution does not allow *any* limits on political spending." Argument of Laura Etherton, et al., in support of Measure 47 (emphasis in the original). Leith Affidavit, Ex. 2, voters' pamphlet information for Measure 47 at 26. Indeed, plaintiffs' counsel Meek himself explained in an article, supporting

[5] It is reasonable to assume, in the absence of contrary authority, that voters' pamphlet information concerning the simultaneous and closely related Measure 46 provides relevant history for interpreting the voters' intent with respect to Measure 47.

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both Measure 46 and Measure 47, that Measure 46 "is needed, because the Oregon Supreme Court ruled in 1997 that the Oregon Constitution does not currently allow any limits on political contributions in any race for state or local public office." Leith Affidavit, Ex. 3 at 2, Meek article in OregonCatalyst.com.

The text, the context, and the legislative history show that the voters understood and intended that a constitutional change would be necessary to authorize Measure 47's CC&E limits. The intended meaning of § (9)(f) therefore is clear. By providing for the contingency that the Oregon Constitution might not allow CC&E limits, § (9)(f) essentially contemplated what would happen if Measure 46 failed, thereby leaving undisturbed the constitutional status quo. That contingency has come to pass. Because the status quo is unchanged, § (9)(f) is triggered, placing the entire measure in abeyance pending a constitutional change.[6]

b. In any event, § (9)(f) is triggered because the Oregon Constitution presently bars CC&E limits.

Even if Measure 47 did not itself establish the need for an authorizing constitutional change, § (9)(f) plainly is triggered at least if, on the Act's effective date, the Oregon Constitution does not permit CC&E limits. That accurately describes the current circumstances.

As discussed above, the Oregon Supreme Court has held—definitively and categorically—that statutory limits on CC&Es are impermissible under the Oregon Constitution. *Meyer*, 341 Or. at 299 ("legislatively imposed limitations on individual political campaign contributions and expenditures [are] impermissible."); *Vannatta*, 324 Or. at 541 (because political campaign contribution limitations restrict expression, they are unconstitutional under Article I, § 8). Thus, under either plausible interpretation of § (9)(f), that provision is triggered and its mandate applies.

[6] As noted above, this analysis effectively provides a subconstitutional ground for decision, based exclusively on interpretation of the measure itself.

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The Hazell plaintiffs nevertheless present several arguments in an effort to support Measure 47's CC&E limits under the existing constitution.

First, they argue—apparently in the alternative—that § (9)(f) is triggered: (1) only upon a "general" ruling that CC&E limits are impermissible (Hazell Memo at 13-15); or (2) only upon a ruling that Measure 47's specific CC&E limits are invalid (Hazell Memo at 16-17). They contend that neither event has yet occurred. As demonstrated above, however, the Oregon Supreme Court has ruled generally that CC&E limits are constitutionally impermissible in this state. *Vannatta*; *Meyer*.[7] Moreover, those rulings encompass the specific CC&E limits in Measure 47.

Second, the Hazell plaintiffs argue that Measure 47's regulation of CC&Es may be distinguished from the measure at issue in *Vannatta* on the ground that Measure 47 includes extensive findings as to the harm it is intended to address. Hazell Memo at 18-21. While Measure 47's findings are lengthy, they express the same sort of harm that could not save Measure 9 in *Vannatta*. Measure 47, like Measure 9, is intended to prevent undue influence in the political process. The *Vannatta* court's rejection of that as a saving justification for Measure 9 applies equally to Measure 47's extensive iteration of the same purported harm.

Third, the Hazell plaintiffs suggest that corporate or union CC&Es are not within the constitutional protection recognized by *Vannatta*. Hazell Memo at 21. They rely on a sentence in *Vannatta*, disclaiming any right to "spend[] other people's money * * * without their consent," and noting as examples union fair share fees and shareholder's equity. *Vannatta*, 324 Or. at 524. In the next sentence, the *Vannatta* court continued, "Similarly, the law may prohibit certain forms of contributions such as giving bribes." *Id*. The import of both sentences is that only funds legitimately obtained for political purposes properly may be used for such purposes. But those passages do not support the Hazell plaintiffs' contention that corporations and unions are

[7] It is pertinent to recall also the statements discussed above of some plaintiffs in the course of the election, urging the need for a constitutional amendment to authorize CC&E limits.

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without ordinary constitutional protection for their expressive activity. Such entities in fact do enjoy free-speech protection under the Oregon Constitution. *See, e.g., Oregon State Police Officers Ass'n, Inc. v. State*, 308 Or. 531, 783 P.2d 7 (1989), *cert. den.*, 498 U.S. 810 (1990) (striking down statute under Article I, § 8, in response to challenge from incorporated union).

Fourth, the Hazell plaintiffs contend that *Vannatta* did not directly address whether Art. II, § 22, of the Oregon Constitution[8] authorizes certain CC&E limits, notwithstanding Art. I, § 8. They maintain that § 22 authorizes CC&E limits, at least where the contributor is not an individual residing in the candidate's district. Hazell Memo at 22. The *Vannatta* opinion rejected the argument that § 22 generally authorizes limits on CC&Es. But in a footnote, the opinion explained that no party specifically argued that § 22 authorized CC&E limits where the contributor is not an individual residing in the candidate's district. *Vannatta*, 324 Or. at 527 n. 13. Like the parties in *Vannatta*, the Hazell plaintiffs fail to develop any such argument here.

In any event, the federal court has declared Article II, § 22 void under the First Amendment, and defendants are enjoined from enforcing it. *Vannatta v. Keisling*, 899 F. Supp. 488 (D. Or. 1995). The Oregon Supreme Court, in its own *Vannatta* opinion, acknowledged the federal district court *Vannatta* decision striking down § 22, but noted that the federal case was still pending. Therefore, the Oregon Supreme Court declined to give the district court decision preclusive effect. *Vannatta*, 324 Or. at 525-26. But the federal case is now concluded, and the decision now resolves this issue. The void provisions of Article II, § 22 cannot save Measure 47's CC&E limits.

Fifth, the Hazell plaintiffs seek to distinguish Measure 47 based on its provision allowing adjustment of the CC&E limits to whatever extent necessary to achieve constitutionality. Hazell Memo at 22-23. But that provision does not avoid the categorical holding of *Vannatta* and

[8] Article II, section 22 was adopted as Measure 6 in 1994.

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Meyer that any limitation on CC&Es violates Article I, § 8. That clear principle should be given effect here.

Finally, the Hazell plaintiffs also ask the court to revisit *Vannatta*'s interpretation of Article II, § 8 and Article I, § 8. Hazell Memo at 24-40. It is entirely proper for the Hazell plaintiffs to preserve those issues by presenting their arguments to this court. But this court is bound, at least for the time being, by the Oregon Supreme Court's holdings in *Vannatta* and *Meyer*.[9]

c. Section (9)(f) is triggered, even though other non-CC&E provisions in the measure may be valid.

Plaintiffs also argue that § (9)(f) is not triggered, because some "limitations" on CC&Es are permissible under the constitution. They maintain that the term "limitations," as it is used in § (9)(f), does not refer exclusively to numeric limits on the amounts of CC&Es. Instead, they contend, the term also contemplates other requirements, such as those related to disclosure and reporting of CC&Es. *See* Hazell Memo at 15-16.

The plain text of § (9)(f) refutes that contention. The provision makes the measure's operative effect contingent on the validity of "limitations on political campaign contributions or expenditures." Giving that text its plain meaning, it refers only to numeric limitations on the amounts of individual campaign contributions and expenditures. Section (9)(f) is not concerned with whether the Oregon Constitution condones any other requirement.

The context provided by the Act as a whole confirms that interpretation. Section (9)(f)'s phrase "limitation on political campaign contributions or expenditures"—or close variations of

[9] The Hazell plaintiffs' memorandum includes the somewhat cryptic pronouncement that Measure 47 "does not prohibit expression" and therefore should be sustained on the ground that it is not unduly vague. Hazell Memo at 23-24. To the contrary, as a regulation of CC&Es, Measure 47 does regulate expression, as resolved in *Vannatta*.

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it—is used numerous times in Measure 47. Not surprisingly, in each and every instance it refers to limits on the amounts of CC&Es.[10]

Moreover, in several instances, the treatment of CC&E limitations contrasts with the treatment of the other requirements of the Act, including the disclosure and reporting requirements. For example, the preamble to Measure 47 discusses the purpose to limit CC&Es *and* increase timely public disclosure of CC&Es, explaining that "[t]hese limits and disclosure requirements" are necessary to curb undue influence. Similarly, the first subsection of the Act finds that all of the Act's "prohibitions, limits, and reporting and disclosure requirements" are necessary to curb undue influence. Measure 47, § (1)(a). That usage, like the usage in the preamble, makes clear that Measure 47 does not treat "reporting and disclosure requirements" as a subset of CC&E limits. Giving each term independent effect, that provision unmistakably distinguishes between "limits" and "reporting and disclosure requirements."

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[10] *See* § (1)(a) ("due to the lack of reasonable limits on political campaign contributions and expenditures…"), § (1)(l) ("Allowing unlimited individual contributions accords undue influence to wealthy individuals…"), § (1)(m) (1) ("allowing unlimited use of personal funds undermines the goal of robust public debate…"), § (1)(n) ("contribution limits can also be circumvented when adults use minors to make additional contributions."), § (1)(p) ("Reasonable limits on contributions…are also necessary to avoid the adverse effects of large contributions…"), § (1)(s) (explaining that "limits in this Act will allow effective campaigns" and pointing to example of Tom Potter's mayoral campaign, in which he received contributions "not exceeding $25 per individual"), § (1)(t) ("Limiting contributions will encourage candidates to spend more time in direct contact with voters…and less time raising funds from large contributors."), § (1)(u) ("So-called" independent expenditures' … must also be regulated and disclosed, in order to avoid circumvention of the limits on political contributions;" explaining that such expenditures have been the conduit for "more than $500 million" to federal candidates); § (1)(v) ("When campaign contribution limits were in place in Oregon's 1996 election cycle, 'independent expenditures' increased from a negligible level to over $1.85 million, as large donors evaded the contribution limits…"), § (1)(x) (referring to "age limits" separately, rather than as part of CC&E limits), § (3)(c) ("No [entity] shall accept a contribution or make a contribution, except…in accordance with the contribution limits set forth in this Act."), § (4)(a) (establishing maximum dollar amounts for a candidate's own contributions, thus allowing "an additional fifty percent (50%) of these limits, if the candidate is not the incumbent"), § (5)(a) ("No [entity] shall expend funds to support or oppose a candidate, except those collected…in accordance with the contribution limits…in this Act."), § (6)(e) ("Political committees…may make independent expenditures from amounts received in compliance with the contribution limits of…this Act."), § (7)(a) (the Act does not preclude certain entities establishing political committee funds, provided that the fund consists solely of contributions "within the limits established by...this Act"), § (9)(d) (referring separately to numeric dollar limits, percentage limits, and age limits).

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The measure's organization also confirms that "limitations on campaign contributions and expenditures" refers to the Act's numeric limits on CC&E amounts. CC&E limits are addressed comprehensively in §§ 3-6 of the Act.[11] Consistently throughout those sections, "limits" refers exclusively to limits on the amounts of CC&Es. By contrast, § 8—entitled "Reporting of Contributions and Expenditures"—does not use the term "limit," or any variant of it, at all.

Thus, the contextual usage is consistent with the plain meaning of the term "limitations on [CC&Es]" in § (9)(f). The text and the context confirm that "limitations," as used in section (9)(f), unambiguously refers to limitations on the amounts of campaign contributions and expenditures.

But even if the text and context did not unambiguously resolve the question, the legislative history of Measure 47 further confirms that conclusion. Not surprisingly, the vast bulk of the voters' pamphlet and newspaper information about Measures 46 and 47 focused on their substantive provisions, not § (9)(f)'s application in the event that Measure 46 failed. But that is not to say that the legislative history is silent.

For example, various commentators explained, in various terms, that Measure 47 would go into effect *only if* state constitutional free-speech rights were first abrogated. Thus, the voters' pamphlet information with respect to Measure 47 included the following argument in opposition, furnished by Megan Sweeney, SEIU Local 49, SEIU Local 503, and OPEU: "[Y]ou have to surrender your existing constitutional rights through Measure 46 for Measure 47 *to even be able to take effect*." Leith Affidavit, Ex. 2 at 41 (emphasis added). Similarly, a *Bend Bulletin* article explained that Measure 47 "[o]nly goes into effect if Measure 46 also passes." Leith

[11] Section 3 is entitled "Limits on Contributions relating to Candidates." Section 4 relates to "Candidate Personal Contributions and Expenditures." Section 5 addresses "Expenditures by or Coordinated with Candidates, Political Committees, or Political Parties." And section 6 pertains to "Independent Expenditures regarding Candidates."

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Affidavit, Ex. 4. And the *Medford Mail Tribune* explained in an editorial that Measure 46 "must pass to allow Measure 47 to take effect." Leith Affidavit, Ex. 5.

Each of those items clearly conveys that Measure 47 would not become operative, unless CC&E limits become constitutionally authorized. Plaintiffs' argument that Measure 47 may become operative despite the continued invalidity of CC&E limits contradicts that information presented to the electorate.

Thus, the text, context, and history all confirm the unambiguous meaning of § (9)(f)'s trigger. That subsection is triggered here because CC&E limits still are foreclosed under the Oregon Constitution.

2. Because § (9)(f) is triggered, the entire Act is held in abeyance.

Section (9)(f) provides in the clearest terms that if CC&E limits are not permitted under the Oregon Constitution on Measure 47's effective date, "*this Act* shall nevertheless be codified and shall become effective" when the Constitution is found or amended to allow such limits. Measure 47, § (9)(f) (emphasis added). As discussed above, that mandate is triggered in the present circumstances. Accordingly, by the plain terms of the Act, no part of the Act is operative at this time. Instead, the Act is codified and remains dormant until the conditions for its operative effect, set forth in § (9)(f), are met.

That result gives effect to both § (9)(f) and Measure 47's severability clause.[12] If only the unconstitutional CC&E limitations were held in abeyance by § (9)(f), as suggested by plaintiffs, then § (9)(f) would be redundant of the severability clause. To give both provisions effect, § (9)(f) should be read—in accordance with its plain terms—to hold *the entire Act* in abeyance pending state constitutional authorization of CC&E limits. Any other constitutional deficiencies (including any defects under the federal constitution) are then the province of the severability clause.

[12] As noted above, that severability clause is § (11) of Measure 47.

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B. Section (9)(f) is not unconstitutional.

As noted above, the Horton plaintiffs additionally challenge the constitutionality of § (9)(f).[13] They maintain that § (9)(f) unconstitutionally purports to defer Measure 47's effective date. The constitution mandates that an initiative is effective 30 days after enactment. Or. Const., Art. IV, § 1(4)(d). The Horton plaintiffs contend that § (9)(f) violates that provision by instead directing that the measure shall become effective upon an indeterminate contingency. They ask the court to sever § (9)(f), and thereby allow the balance of the measure to become effective in the ordinary course.

It certainly is true that Article IV, § 1(4)(d) makes an initiated measure constitutionally effective 30 days after the election at which it is adopted. But the Horton plaintiffs' suggestion that § (9)(f) addresses constitutional effectiveness, rather than operative effectiveness, is rebutted by the Supreme Court's decision in *State v. Hecker*, 109 Or. 520, 221 P. 808 (1923).

Hecker was a criminal case, in which the defendant challenged Oregon's death-penalty statutes. By way of background, in 1914, voters had adopted a constitutional amendment abolishing the death penalty. In the next legislative session, all death penalty statutes were formally repealed. *See Hecker*, 109 Or. at 532-35.

Then in 1920, the legislature referred a proposed constitutional amendment reinstating the death penalty for a vote at a special election on May 21, 1920. The 1920 legislature also enacted implementing legislation, particularly Oregon Laws 1920, chapter 20 ("Chapter 20"), anticipating constitutional authorization for the death penalty.

Like any other statute adopted by the Legislative Assembly without an emergency clause, Chapter 20 would become effective ninety days after the legislative session. Or. Const., Art. IV,

[13] Intervenors also challenge the validity of section (9)(f). But because that challenge is based on a different legal theory and raises a number of separate predicate issues, intervenors' claim is addressed separately below.

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§ 28.[14] As it happened, that date came before the special election on the authorizing constitutional amendment. But Chapter 20 itself provided, "This act shall take effect as soon as and whenever [the Oregon Constitution] will permit." Or. Laws 1920, ch. 20 (quoted in *Hecker*, 109 Or. at 539). The Supreme Court considered whether that provision was invalid as an attempt to alter the Act's constitutionally mandated effective date. The court construed "shall take effect," as used in Chapter 20, to "merely mean[] that the active operation of Chapter 20, is postponed until the adoption of the 1920 amendment to the Constitution." *Hecker*, 109 Or. at 546.

By construing "take effect" as a reference only to operative effect, the court appropriately avoided interpreting the statute to create a conflict with the constitution. The statute's legal "effective date" was controlled by the Constitution, but its drafters properly could—by use of an effectiveness provision—defer its operative effect for an indeterminate contingency. *See also Marr v. Fisher*, 182 Or. 383, 390, 187 P.2d 966 (1947) (legislature permissibly made "operative effect" of new tax exemption dependent on adoption of a substitute tax).

The same analysis applies with equal force here. Just as in *Hecker*, § (9)(f)'s use of the phrase "shall become effective" should be construed merely to defer the measure's operative effect. So construed—as in *Hecker*—§ (9)(f) does not address the measure's legal effective date, which is controlled by the Constitution. And as in *Hecker*, the measure's contingent *operative* effect does not conflict with the state constitution.

The Horton plaintiffs contend, however, that *Smith v. Cameron*, 123 Or. 501, 262 P. 946 (1928) overruled *Hecker*. Under *Cameron*, they argue, a statute is void if it lacks constitutional authorization when adopted. They maintain that § (9)(f) violates that principle, because it

[14] The counterpart to Article IV, § 28, applicable to initiated statutes, is Article IV, § 1(4)(d). As discussed above, that provision similarly establishes a date certain as the effective date for initiated statutes.

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purports to make Measure 47 dormant—rather than void—if it is unconstitutional when adopted. Horton Memo at 4-6.

In fact, *Cameron* and *Hecker* are easily reconciled, and this case is analogous to *Hecker*, not *Cameron*. Unlike *Hecker*—and unlike this case—the statute at issue in *Cameron* did not include a clause deferring its operative effect, pending constitutional authorization.

As discussed above, the statute at issue in *Hecker*, Chapter 20, purported to implement the death penalty, even though the death penalty was unconstitutional on the Act's effective date. The Supreme Court considered whether those circumstances rendered the statute invalid under the constitution. The court found no conflict, precisely on account of Chapter 20's provision deferring its operative effect:

> If the question of conflict is to be determined by the possibility of the statute running counter to the Constitution, then there is no conflict between Chapter 20 and the Constitution; because the operation of Chapter 20 was by its own restraining language absolutely prevented from operating and hence running counter to the Constitution.

Hecker, 109 Or. at 547.

The court concluded that the statute "was enacted for the sole purpose of prescribing a procedure that "could be available only upon the amendment of the Constitution. The purpose was to make [the statute] operative contemporaneously with but not before the amendment of the Constitution. It is our view that Chapter 20 is constitutional." *Id*. Thus, the provision deferring Chapter 20's operative effect, pending constitutional authorization, ensured that it was not constitutionally void in the meantime.

By contrast, the statute in *Cameron* did not defer its own operative effect for constitutional authorization. Accordingly, the Supreme Court substantively analyzed its constitutionality. Finding the statute constitutionally deficient, the court held it void.

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Like the statute in *Hecker*—and unlike that in *Cameron*—Measure 47 is drafted with the specific and expressed purpose that it should become operative only at such time as it obtains constitutional authorization. As such, like the statute in *Hecker*—and unlike that in *Cameron*—Measure 47 does not conflict with the Oregon Constitution. And accordingly, like the statute in *Hecker*—and unlike that in *Cameron*—Measure 47 is not constitutionally void. *Cameron* is inapposite and of no assistance to the Horton plaintiffs here.

The Horton plaintiffs next suggest that § (9)(f) is unconstitutional "surplusage" because, they maintain, whether a statute is revived by a future constitutional amendment depends on the terms of the future amendment, not the terms of the statute itself. Horton Memo at 7-10. For that proposition, they rely on *Northern Wasco People's Utility Dist. v. Wasco Co.*, 210 Or. 1, 305 P.2d 766 (1957).

In effect, this contention again assumes that *Hecker* has been overruled *sub silentio*. But just as *Cameron* readily could be reconciled with *Hecker*—on the simple ground that *Cameron* did not involve a statute made contingent on constitutional authorization—*Hecker* and *Northern Wasco* are readily harmonized *on that same ground*.

In *Northern Wasco*, the court concluded that the statute at issue was constitutionally invalid when adopted. *Northern Wasco*, 210 Or. at 12. From the premise that the statute was invalid as enacted, the court rejected the county's contention that the statute nevertheless was validated by a subsequent constitutional amendment:

> "The County asks the court to hold that the [amendment] validates a statutory provision which was void when enacted in 1939. Such a holding would not be proper."

Id. at 12. The court went on to explain that void legislation could be ratified by a subsequent constitutional amendment only if the amendment indicates such an intent. *Id*. at 12-14.

But as discussed above, Measure 47—like the statute in *Hecker*, and unlike the statute in *Northern Wasco*—was not void as enacted. Rather, Measure 47 is insulated from such a challenge (as in *Hecker*) by virtue of the provision deferring its operative effect pending

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constitutional authorization. Like the statute in *Hecker*, that language ensures that Measure 47 cannot run afoul of—or be void under—the constitution. And because the statute is not invalid as enacted, it is not subject to the rule from *Northern Wasco* that an *invalid* statute cannot be revived except pursuant to the express intent of a subsequent enactment.

The Horton plaintiffs argue further that the contingencies on which Measure 47 would become operative are too vague. Horton Memo at 10-15. They offer no controlling authority, however, in support of the proposed definiteness requirement. In any event, the pertinent contingencies under § (9)(f) are clear. One may readily discern whether the constitution has been amended to permit CC&E limits, or whether the Supreme Court has overruled *Vannatta*, thereby removing the constitutional obstacle to CC&E limits. Assuming a definiteness requirement applies, it is satisfied here.

Thus, with respect to plaintiffs' claims, § (9)(f) is valid under the controlling authority of *Hecker*. That section places the entire Act in abeyance in the present circumstances.

II. Intervenors are not entitled to the relief sought on their cross-claim.

Intervenors contend that Measure 47 is void under Article I, § 21, of the Oregon Constitution, which provides, in pertinent part, that no law shall be passed "the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution." Intervenors contend that the contingency contained in § (9)(f) renders Measure 47 invalid under Article I, § 21. Intervenors are not entitled to relief on that cross-claim for at least three reasons: (1) they lack standing; (2) the cross-claim does not present a ripe controversy; and (3) the contingency contained in § (9)(f) does not render Measure 47 unconstitutional.

A. Intervenors lack standing to prosecute their cross-claim.

Oregon courts do not recognize common law standing; instead, a plaintiff's standing to sue must be conferred by statute, at least for challenges to government action. *See, e.g., People for the Ethical Treatment of Animals v. Institutional Animal Care,* 312 Or. 95, 99, 817 P.2d 1299 (1991) ("Standing is not a matter of common law [citing cases]; it is conferred by the Legislative

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Assembly."). Intervenors invoke the Declaratory Judgment Act, ORS 28.010 *et seq*. Their standing, therefore, depends on their meeting the standing criteria of that act. ORS 28.020 requires that a petitioner be "affected" (present tense):

> Any person * * * whose rights, status or other legal relations *are affected* by a constitution, statute, municipal charter, ordinance, contract or franchise may have determined any question of construction or validity arising under any such instrument, constitution, statute, municipal charter, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

ORS 28.020 (emphasis added).

Standing is not established "when the showing of the required effect [is] too speculative." *See, e.g., Gruber v. Lincoln Hospital District*, 285 Or. 3, 7, 588 P.2d 1281 (1979); *League of Oregon Cities v. State of Oregon*, 334 Or. 645, 658, 56 P.3d 892 (2002). Thus, for example, in *Gortmaker v. Seaton,* 252 Or. 440, 450 P.2d 457 (1969), a district attorney brought a declaratory judgment action seeking to clarify his obligations under a drug statute, claiming he could be civilly or criminally liable if he acted unlawfully. The court held that he lacked standing, finding his allegations to be "mere conclusions, highly speculative [and] hypothetical." *Gortmaker v. Seaton,* 252 Or. 440, 443, 450 P.2d 457 (1969).

Here, intervenors' alleged standing is predicated solely on interests that might be affected if Measure 47's substantive provisions ever were to become operative. As such, intervenors' potential injury is contingent on a speculative change in the Oregon Constitution. That eventuality is too speculative to confer standing. Until such a constitutional change occurs, leading the responsible State officials to threaten enforcement of Measure 47, its present status—in abeyance—cannot harm intervenors.

Additionally, to establish the requisite effect on "rights, status or other legal relations," a plaintiff must allege "some injury or other impact upon a legally recognized interest beyond an abstract interest in the correct application or the validity of a law." *League of Oregon Cities v. State of Oregon*, 334 Or. 645, 658, 56 P.3d 892 (2002), *citing Eckles v. Oregon*, 306 Or. 380,

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385, 760 P.2d 846 (1988), *appeal dismissed*, 490 U.S. 1032, 109 S. Ct. 1928, 104 L. Ed. 2d 400 (1989). "There is no case for declaratory relief where the plaintiff seeks merely to vindicate a public right to have the laws of the state properly enforced and administered." *Eacret v. Holmes*, 215 Or. 121, 125, 333 P.2d 741 (1958) (internal quotation marks omitted). Where the wrong complained of is "public in character" as opposed to one resulting in a "special injury affecting the plaintiff[]," the Declaratory Judgment Act does not provide that plaintiff with standing. *Eacret,* 215 Or. at 124. That is true even when the plaintiff is more strongly interested in having the law properly enforced than are other members of the public. That deep interest still is not sufficient to establish standing, absent some individual injury. *Id.* at 124-25.

Intervenors' interest in scouring the law books of allegedly unconstitutional statutes is legally indistinguishable from the interest of the general public. That interest is "public in character," and is therefore insufficient to confer standing.

B. The cross-claim does not assert a ripe controversy.

As the Oregon Supreme Court has noted, for a claim to be justiciable, "[t]he controversy must involve present facts as opposed to a dispute which is based on future events of a hypothetical issue." *Brown v. Oregon State Bar,* 293 Or. 446, 449, 648 P.2d 1289 (1982). The controversy must be "of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Hale v. Fireman's Fund Insurance Co.,* 209 Or. 99, 103, 302 P.2d 1010 (1956) (internal quotation marks omitted). Where the alleged controversy is based upon too much speculation or upon hypothetical facts, there is insufficient ripeness to permit a declaratory judgment action. *Id.*

In *Hale v. Fireman's Fund Insurance Co.,* 209 Or. 99, 302 P.2d 1010 (1956), the plaintiff had been involved in an auto accident and alleged that the driver of the other vehicle would not be able to pay damages. So before trial, the plaintiff sought a declaratory judgment as to the obligation of the other driver's insurer. *Hale,* 209 Or. at 100-01. The court held that the declaratory judgment action against the insurer was not ripe. *Id.* at 107-13. "[T]he purported

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rights upon which the plaintiff depends are too remote and contingent to be appropriate for declaratory relief." *Id.* at 107-08. Because plaintiff's claim for declaratory relief was contingent upon the occurrence of uncertain future events, it did not present "a controversy of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* at 113 (internal quotation marks omitted).

Here, intervenors seek to protect their free-speech rights, which might be affected if Measure 47 were ever to become operative. But the contingencies that might one day make the measure operative are now speculative. Until something brings—or at least concretely threatens to bring—Measure 47 into operative effect, there is no ripe controversy for this court. *Eckles v. State of Oregon*, 306 Or. 380, 383 n. 3 (1988), *appeal dism'd*, 490 U.S. 1032 (1989) (noting that provision of challenged statute relating to contingent effectiveness might be constitutionally vulnerable, but deferring that issue because the event that would have made the contingent section operative had not occurred).

Thus, intervenors' claim, like the unripe claim in *Hale* and like the unripe issue in *Eckles*, assumes a future anticipated event. As in those cases, intervenors' reliance on speculation about future events renders their cross-claim unripe.[15]

C. In any event, Measure 47 is not void, as alleged by intervenors.

In any event, if the court addresses intervenors' cross-claim on the merits, it should declare, contrary to intervenors' prayer, that the challenged provision is not unconstitutional. Intervenors' arguments are addressed in turn below.

[15] Ripeness is asserted against intervenors' challenge to section (9)(f), but not against the Horton plaintiffs' challenge, for two reasons. First, the Horton plaintiffs' challenge is largely to the validity of the direction to place Measure 47 in abeyance, while intervenors challenge the validity of the speculative circumstances under which the measure may be brought into operation. Second, the alleged harm supporting the Horton plaintiffs' standing arises from nonimplementation of Measure 47, an immediate effect that would be avoided if they were to prevail on their challenge. Intervenors, by contrast, claim they would be harmed if Measure 47 became operative, a speculative effect that may never arise.

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1. Section (9)(f) properly should be construed to defer only the Act's operative effect, not its effective date.

Like the Horton plaintiffs, intervenors argue that § (9)(f) must be construed as an attempt to alter the *effective date*, not just the *operative effect*, of Measure 47. Intervenors rely on *Hecker* for that proposition. Intervenors' Memo at 6-10. Yet the holding in *Hecker* stands in the face of intervenors' position.

As discussed above, *Hecker* makes clear that § (9)(f)'s use of the term "shall become effective" must be construed to mean "shall become *operationally* effective." So construed, as in *Hecker*, § (9)(f) conflicts with no constitutional requirements.

Moreover, neither of the other cases cited by intervenors for this proposition—*Fouts v. Hood River*, 46 Or. 492 (1905) and *Marr v. Fisher*, 182 Or. 383 (1947)—are of any greater assistance to them.

Indeed, *Fouts* was strong authority in support of the decision in *Hecker*. In *Fouts*, like *Hecker*, the statute at issue provided that it would "take effect" at an appointed time, depending on a specified contingency. *Fouts*, 46 Or. at 494-95. The court first affirmed the principle that whether or not a law takes effect—in the sense of whether it becomes a law—cannot be made dependent on external contingencies. *Id*. at 496-97. The Supreme Court went on, however, to explain that "[t]he pivotal and cardinal question here is whether the present legislation has been made by the act itself to take effect—that is, to become a law—dependent upon" an external contingency. *Id*. at 497. After reviewing pertinent case law from around the country, the court in *Fouts* held that the challenged law, "when enacted, was complete in itself, requiring nothing else to give it validity. It became effective as a law from the time of its enactment." *Id*. at 502-03. The effectiveness provision merely was part of the "enginery of the law," designed to determine only whether the Act would "become operative or not." *Id*. at 503. Finally, the court allowed that the "wording of the act is not aptly devised," but ruled that "the undoubted intendment" is that the Act "shall become operative" on the specified contingency. *Id*.

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Thus, *Fouts* and *Hecker* both stand for precisely the opposite proposition from that advanced by intervenors and for which intervenors claim them as support. In both of those cases, like the present one, the constitutionality of legislation was challenged on the ground that the statute's "effect" was made contingent. In both of those cases, the Oregon Supreme Court recognized that the intent could not have been to alter the constitutionally mandated *effective date* of the statute at issue. Instead, in both cases, the Supreme Court recognized that the provisions at issue meant only to defer the *operative effect* of the legislation. That result should obtain here, as well, under those authorities.

Marr also is unavailing to intervenors. In that case, the legislation expressly made its own operation contingent. Not surprisingly, the court treated that direction as related to the statute's operative effect, not its effective date. But that has little bearing here.

Finally, intervenors envision a rigorous practice growing out of those cases. Intervenors' Memo at 10-14. They imagine that drafters of Oregon initiatives uniformly direct that proposed legislation will be contingently "operative" if they mean to address operative effectiveness. Similarly, intervenors suggest that drafters would use "effective" wherever they want to adjust the legislation's effective date—which is to say, whenever they want to offend the constitutional mandate with respect to an initiative's effective date.

Intervenors' anecdotal suggestion that a uniform practice exists is unpersuasive. But even if such a practice did exist, it would not bind the courts in their duty to interpret the law.

As *Hecker* and *Fouts* demonstrate, a term directing that legislation shall take effect contingently is most reasonably construed as a reference to operative effect, not as an unconstitutional attempt to adjust the legislation's effective date. Accordingly, in the absence of any indication otherwise, § (9)(f) of Measure 47 should be construed as a direction that the measure's operative effect shall be deferred in specified circumstances, though its effective date remains as provided in Article IV, § 1(4)(d).

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2. The contingencies provided in § (9)(f) are permissible.

Intervenors also challenge the specific contingencies on which Measure 47 would be animated. Their argument is entirely predicated on the erroneous assumption that § (9)(f) addresses the measure's *effective date*, rather than the conditions for its *operative effect*. But failing that argument, intervenors may also contend that the contingencies specified in § (9)(f) are not permissible, even only as triggers for the measure's operative effect.

Section (9)(f) directs that Measure 47 shall become operative when either the constitution is amended to permit CC&E limits, or when it is construed to allow CC&E limits. As discussed above, no ripe issue is presented with respect to the validity of either contingency. *Eckles*. But the contingencies are readily defensible, in any event.

Indeed, the contingency rendering Measure 47 operative if it is authorized by constitutional amendment is exactly the same contingency upheld in *Hecker*. Intervenors suggest that a measure should have to specify the election at which it would obtain constitutional authorization. But they cite no authority or reason for such a requirement. Indeed, the provision at issue in *Hecker* similarly did not specify an election. If this court reaches the question, it should uphold § (9)(f)'s direction that Measure 47 shall become operative upon amendment of the constitution to allow CC&E limits.

The alternative contingency—that the constitution is found to allow CC&E limits—presents a somewhat more difficult question. The Supreme Court in *Portland v. Coffey*, 67 Or. 507, 135 P. 358 (1913), did strike down a provision that made part of the statute operative only if another part of the statute was ruled unconstitutional. That holding is inapposite here, however, because the contingency in this case is not that a provision of the current measure is held invalid. Rather, the contingency is that an existing Supreme Court precedent may be overruled rendering the present measure valid. That contingency is effectively identical to the first contingency: it merely provides that the measure is in abeyance until its CC&E requirements become constitutionally permissible.

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If, however, the court were to conclude that the measure's operative effect cannot be made to depend on a judicial finding, the court should merely strike and sever that specific clause of § (9)(f). The balance of the section is valid and should be given effect. ORS 174.040.

3. There is no "chicken-or-the-egg? conundrum."

Intervenors also posit that if § (9)(f) is given effect, then it—as part of the Act—must not be given effect. *See* Intervenors' Memo at 4, 10 n. 6, 13-14. That argument does not present a tenable position on the interpretation of § (9)(f). Section (9)(f) was intended to defer the operative effect of Measure 47 in specified circumstances. It would defeat that purpose if it were construed to render itself inoperative. As in *Hecker*, a statutory provision deferring the statute's operation must be given effect in order to vindicate the legislative intent.

CONCLUSION

At the 2006 general election, the people approved Measure 47. The measure itself recognized its own need for affirmative constitutional authorization, and so deferred its own operative effect for such authorization. Moreover, Measure 47's proponents simultaneously sought an authorizing amendment. But that amendment was rejected. Accordingly, as provided in the measure itself, Measure 47 should be codified but not given operative effect at this time. This court should so declare.

DATED this ___ day of April, 2007.

Respectfully submitted,

HARDY MYERS
Attorney General

DAVID E. LEITH #93341
Attorney-in-Charge
Special Litigation Unit
Trial Attorney
David.Leith@doj.state.or.us
Of Attorneys for Defendants

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4793