IN THE CIRCUIT COURT FOR THE STATE OF OREGON
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.

Case No. 06C-22473

MOTION FOR SUMMARY JUDGMENT BY PLAINTIFFS HAZELL, NELSON, CIVILETTI, DELK, AND DUELL

AND

MEMORANDUM IN SUPPORT

Judge Mary M. James
Hearing: June 18, 2007
9:30 a.m.
Recording Requested

DANIEL W. MEEK
OSB No. 79124
10949 S.W. 4th Avenue
Portland, OR 97219
503.293.9021 voice
503.293.9099 fax
dan@meek.net

For Plaintiffs Hazell, Nelson, Civiletti, Delk, and Duell

TABLE OF CONTENTS

I. MOTION FOR PARTIAL SUMMARY JUDGMENT.

Plaintiffs Hazell, Nelson, Civiletti, Delk, and Duell [hereinafter "Hazell" or "Hazell Plaintiffs"] move for an order granting summary judgment on the merits of their First and Second Claims for Relief, based upon the affidavit and materials filed herewith and the discussion and authority cited below.

II. MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT.

A. STANDING TO PURSUE THIS ACTION.

There should be no question as to the standing of Plaintiffs to pursue this action. Plaintiffs are each and all Oregon citizens, electors and taxpayers. Plaintiffs Bryn Hazell and Francis Nelson served as Chief Petitioners for Oregon statewide ballot measure Petition 37 (2006), which became Oregon statewide Measure 47 when it qualified for the November 2006 general election ballot. Every plaintiff is a registered voter in Oregon; expended time or money in gathering signatures on Petition 37 or in supporting the enactment of Measure 47; and desires the full implementation of the substantive provisions of Measure 47.

Every plaintiff is adversely affected and aggrieved by the failure of the Defendants to implement and enforce each and all of the provisions of Measure 47. Each is adversely affected and aggrieved, because (1) each supported Measure 47 and voted for Measure 47 yet see that is not being implemented and (2) each is a participant in the political campaign process in Oregon whose influence is overwhelmed by the influence of the huge campaign contributions and independent

expenditures by corporations, unions, other entities, and individuals, as documented by the legislative findings of fact in Section (1) of Measure 47.

B. JURISDICTION AND VENUE.

This Court has jurisdiction of this action under ORS 183.484(1), ORS 246.910, and ORS 28.010a.. Venue for actions against Defendants under these statutes is in the Marion County Circuit Court.

C. STANDARD FOR GRANTING SUMMARY JUDGMENT.

The standard is set forth in ***Jones v. GMC***, 325 Or 404, 413, 939 P2d 608 (1997):

> In ***Seeborg v. General Motors Corporation***, 284 Ore. 695, 700-01, 588 P2d 1100 (1978), this court held that a court may allow a summary judgment motion, due to the absence of a genuine issue as to any material fact for trial, if the record fails to show the existence of a triable issue, that is, sufficient evidence to entitle a party to a jury determination: In deciding whether a genuine issue of fact exists, courts generally read "genuine issue" to mean 'triable issue.' Before a party has a triable issue, he or she must have sufficient evidence to be entitled to a jury determination. This has led both courts and commentators to compare the motion for summary judgment to the motion for a directed verdict. 10 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 2713.

Plaintiffs have the burden at trial of proving the elements of their case and thus, at this stage of the proceedings, showing that there is an *absence* of any triable issues. The proponent of summary judgment must show that "no objectively reasonable" trier of fact could return a verdict" for the opponent of summary judgment. *Id.* at 412, 939 P2d 608; ***Hardie v. Legacy Health System***, 167 OrApp 425, 428, 6 P3d 531 (2000). Plaintiffs meet this burden, because the record before this Court

shows that no reasonable trier of fact could find that the legislative findings were irrational or totally without reason.

D. THE APPLICABLE FACTS.

The undisputed material facts include the results of the November 2006 election, the legislative findings of fact in Measure 47, § 1, the declarations of Bryn Hazell and Daniel Meek, and other facts which are appropriate for judicial notice.

At the November 7, 2006, general election, the voters of Oregon enacted Measure 47 (copy attached as Exhibit A to the Complaint). The Oregon Constitution, Article IV, § 1(4)(d), provides that an initiative enacted by vote of the people shall become effective 30 days after the date on which it is enacted. Thus, Measure 47 became effective on December 7, 2006.

Measure 47 is a statute pertaining to elections and directs its own codification as ORS Chapter 259. Section (10)(a) of Measure 47 directly orders both Defendants to administer and enforce its provisions.

On behalf of the Secretary, the Director of Elections (John Lindback) on November 17, 2006, sent a letter to the Chief Petitioners, which stated that the Secretary will not implement any part of Measure 47 other than Section (9)(f) (copy attached as Exhibit B to the Complaint). The Attorney General then notified legal representatives of the Chief Petitioners for Measure 47 that he will not implement any part of Measure 47 other than Section (9)(f) and that he would take no action to obtain judicial interpretation of any of the terms of Measure 47.

E. MATERIAL FACTS ARE NOT IN DISPUTE.

There are no disputes of material fact pertinent to Defendants' obligations to implement and enforce the provisions of Measure 47. Plaintiffs are all registered voters[1] and thus have standing.

III. THE HAZELL PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR FIRST CLAIM FOR RELIEF (Declaratory Judgment).

A. INTRODUCTION.

Pursuant to ORS 28.010 to 28.160, ORS 183.486(1), and ORS 246.910, *inter alia*, The Hazell Plaintiffs are entitled to a declaration that:

1. Each Defendant is obligated to administer and enforce each and all of the provisions of Measure 47.

2. Section (9)(f) does not authorize either Defendant to avoid administering and enforcing the provisions of Measure 47 other than Section (9)(f).

By refusing to implement any part of Measure 47 other than an incorrect implementation of Section (9)(f), the Secretary is in violation of his duty:

1. As the "chief elections officer of this state," ORS 246.110, to implement duly enacted laws pertaining to elections; and

2. To implement a duly enacted statute which designates the Secretary as an officer responsible for implementation of such statute.

By refusing to implement any part of Measure 47 other than an incorrect implementation of Section (9)(f), the Attorney General is in violation of his duty, as the

---

1. This fact is easily confirmed by reference to voter registration records available at every county elections office and at the office of Defendant Secretary of State.

chief law enforcement officer of this state, to implement duly enacted laws and also statutes which designate the Attorney General as an officer responsible for implementation of such statutes.

When a statute is enacted by duly-constituted legislative authority, it is not within the privileges of these officeholders to refuse to implement or enforce the law. Measure 47 was duly enacted by the voters of Oregon on November 7, 2006. Defendants are obligated to implement and enforce it.

Defendants, however, contend that Measure 47 is contrary to the teachings of ***Vannatta v. Keisling***, 324 Or 514, 931 P2d 770 (1997), which held that Article I, Section 8, did not allow a legislative body in Oregon to limit political campaign contributions or expenditures in the manner of Measure 9 of 1994. Measure 47 is not identical to Measure 9 of 1994 but is different in many ways. The differences include:

1. Measure 47 has a more strict severability clause.

2. Measure 47 has express instructions to the courts regarding preserving the effectiveness of its provisions by means of narrowing interpretations (Section (9)(e)).

3. Measure 47 has numerous independently enforceable provisions against which there are no cognizable constitutional challenges, including disclosure and reporting requirements that do not set numeric limits on political contributions or expenditures.
4. Measure 47 has extensive legislative findings of fact supporting and explaining the need for and state interest in each substantive provision.

5. Measure 47 has a clause that adjusts the numeric limits and thresholds to levels acceptable under the United States Constitution and Oregon Constitution (Section (9)(d)).

B. GOVERNMENT OFFICERS ARE REQUIRED TO IMPLEMENT AND ENFORCE DULY-ENACTED STATUTES.

Measure 47 contains requirements which are expressly mandatory upon participants in political campaigns and upon the government officers responsible for implementing and enforcing the terms of Measure 47. Government officers are not free to disregard their responsibilities assigned to them by duly-enacted statutes. Nor may the courts excuse non-implementation of duly-enacted statutes, except for express and severe conflict with the oregon constitution.

> It is always a delicate matter to declare a statute duly enacted by the Legislature unconstitutional, and unless the conflict between the Constitution and the statute is clear the court will not declare it void. This statute was passed under the police power of the state. Such power is exclusively vested in the Legislature and covers all laws relating to the public health, morals, and welfare. It is only when fundamental rights which are beyond the scope of the police power are interfered with that the court under the Constitution protects such rights from the excess of power. * * * And it is a well-known rule of statutory construction that if a statute is capable of two meanings, one which would uphold it and the other deny it, the court will uphold its validity. Texas v. Eastern Texas R. Co., 258 U. S. 204, 42 S. Ct. 281, 66 L. Ed. 566; United *465 States v. Delaware, etc., 213 U. S. 367, 29 S. Ct. 527, 53 L. Ed. 836. A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts on that score. Panama Ry. Co. v. Johnson, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748.
>
> In construing a state statute the Supreme Court of a state cannot usurp the power of legislation. Under our system of laws no department of the government can transcend the law of its creation. It is for the Legislature to amend and make laws and for the courts to construe them. The court cannot usurp the functions of the Legislature any more than the Legislature can usurp the functions of the court.

Wadsworth v. Brigham, 125 Or. 428, 464m 266 P 875 (1928).

The burden of proof is on those who would challenge the validity of the statute, not those who assert its validity.

> The party asserting constitutional violation must sustain the burden of proof. ***Milwaukie Co. of Jehovah's Witnesses v. Mullen et al***, 1958, 214 Or. 281, 330 P2d 5, *appeal dismissed* 359 U.S. 436, 79 S.Ct. 940, 3 L.Ed.2d 932.

Oregon-Nevada-California Fast Freight, Inc. v. Stewart, 223 Or 314, 326, 353 P2d 541 (1960).

C. THERE IS NO COGNIZABLE CHALLENGE TO LEAST 12 SEVERABLE AND INDEPENDENTLY ENFORCEABLE PROVISIONS OF MEASURE 47.

Literally, there has been no legal challenge to any of the provisions of Measure 47; Defendants on their own have merely refused to implement or enforce any of Measure 47.

Vannatta, *supra*, provides an arguable basis for challenging the validity of the provisions of Measure 47 which set numeric limits on political campaign contributions and expenditures. But it provides no basis for invalidating the severable and independently enforceable parts of Measure 47 which do not involve such limits but instead provide for other types of changes, including additional disclosure and reporting of campaign contributions and expenditures.

1. MEASURE 47 CONTAINS A STRONG SEVERABILITY CLAUSE.

The courts in Oregon are to interpret severability clauses in the same manner as other clauses in legislation: according to the express terms.

> Whether an invalid provision is severable from the enactment of which it is a part is a question of legislative intent. ***Fullerton v. Lamm,*** 177 Or 655, 697, 165 P2d 63 (1946). Thus, if there is an explicit severability clause, our role is to construe it as we would any other enactment, that is to say, in a manner that best reflects the intentions of the voters or the legislative entity that enacted it. ***PGE v. Bureau of Labor and Industries,*** 317 Or 606, 610-12, 859 P2d 1143 (1993) (intent is the touchstone of statutory construction); ***Eduardo v. Clatsop Community Resource***, 168 Or App 383, 387, 4 P3d 83 (2000) ("ordinances are construed using the familiar PGE analysis"). If there is no express severability clause, the law provides a presumption of severability, which may be overcome only if (1) the enactment provides that the remaining parts shall not remain in effect; (2) the remaining parts are so dependent on the invalid part that the remaining parts would not have been enacted without the invalid part; or (3) the remaining parts, standing alone, are incomplete and incapable of being executed in accordance with legislative intent. ORS 174.040.

Advocates for Effective Regulation v. City of Eugene, 176 Or App 370, 376, 32 P3d 228, 231 (2001).

The severability clause in Measure 47 is a strict one:

> (11) Supersession and Severability.
>
> The provisions of this Act shall supersede any provision of law with which they may conflict. For the purpose of determining constitutionality, every section, subsection, and subdivision thereof of this Act, at any level of subdivision, shall be evaluated separately. If any section, subsection or subdivision at any level is held invalid, the remaining sections, subsections and subdivisions shall not be affected and shall remain in full force and effect. The courts shall sever those sections, subsections, and subdivisions necessary to render this Act consistent with the United States Constitution and with the Oregon Constitution. Each section, subsection, and subdivision thereof, at any level of subdivision, shall be considered severable, individually or in any combination.

Since the language of Section (11) is clear and unambiguous on its face, the inquiry under ***PGE v. BOLI*** ends at this juncture. Any invalid provision is severable, no matter how minute, and all remaining provisions are not affected. Thus, even if

some of the provisions of Measure 47 are susceptible to invalidation under ***Vannatta***, the 12 provisions discussed below are not. Consequently, those provisions were lawfully enacted by Oregon voters on November 7, 2006, and became lawfully effective on December 6, 2006.[2]

Measure 47 also contains an express "narrowing construction" clause, Section (9)(e):

> If, in the absence of this Section (9)(e), there would be entered in any court any order impairing the effectiveness of any part of this Act on the ground that the United States Constitution or Oregon Constitution requires that any type of individual or entity be wholly or partially exempt from any of the prohibitions or limitations in this Act, then we, the electors of Oregon, acting in our legislative capacity, hereby declare that the provisions of this Act shall be given a narrowing interpretation so as to avoid invalidation of any provision of this Act and to preserve its effectiveness to the maximum degree consistent with the constitutions.

2. MEASURE 47 CONTAINS NUMEROUS INDEPENDENT PROVISIONS NOT SUSCEPTIBLE TO CHALLENGE UNDER *VANNATTA*.

Among the independently enforceable provisions in Measure 47 that do not establish numeric limits on campaign contributions or expenditures are these 12:

---

2. In contrast, Measure 9 of 1994 contained an express non-severability clause (Section 23(2):

> If any part of this Act is held unconstitutional, the remaining parts shall remain in force unless the court specifically finds that the remaining parts, standing alone, are incomplete and incapable of being executed.

Vannatta implemented this clause. 324 Or at 546.

a. **Section (6)(g):** Every campaign advertisement funded by "independent expenditures" in excess of $2,000 must prominently disclose the top 5 contributors to the "independent" campaign, the businesses they are engaged in, and the amounts contributed by each of them.

b. **Section (4)(b):** Every candidate who spends more than $5,000 of personal money on a campaign for public office must (1) report every subsequent personal contribution to the campaign to the appropriate filing officer within 3 business days, and (2) disclose in every subsequent campaign ad the amount of the candidate's personal money being spent on the campaign.

c. **Section (8)(a):** Every contributor of more than $500 per year must obtain a "handle" from the Secretary of State, so that (1) his future contributions can be more accurately recorded, and (2) he may make future contributions by providing his handle, without again providing his full address and employment information to another campaign or political committee or political party.

d. **Section (8)(b)(1):** Campaign contribution and expenditure reports must include the following personal information for every contributor, regardless of the amount contributed: name, residence address, year of birth, occupation, and employer of the contributor.

e. **Section (8)(b)(2):** Alternatively, the Secretary of State must accept filings of campaign contribution and expenditure reports that provide a contributor's previously registered "handle" in place of the other required personal information.

f. **Section (8)(c):** The Secretary of State must "make available on the Internet in an interactive database format all contribution and expenditure reports" within 5 business days of receiving the data. There is currently no such requirement.

g. **Section (8)(c):** The database to be made available on the Internet must enable the user to determine the amount "from each contributor who has contributed at least five hundred dollars ($500) during the election cycle." The current system does not aggregate the contributions of any contributor across all campaigns, committees, and parties.

h. **Section (7)(d):** "Any solicitation for contributions directed to employees of a corporation or other business entity [must] state[] that there is no required contribution and that the employee's response shall not affect the employee's employment, shall not be provided to the employee's supervisors or managers, and shall remain confidential to the extent allowed by law."

i. **Section (9)(b):** No employer can "require any employee or contractor to make any contribution or independent expenditure to support or oppose any candidate; or provide or promise any benefit or impose or threaten any detriment due to the fact that an employee or contractor did or did not make such contributions or expenditures."

j. **Section (10)(c):** Any person employee subjected to a violation of Section (7)(d) or (9)(b) "shall have a civil cause of action against the violator and shall, upon proof of violation, recover a civil penalty of not less than $50,000 per incident of violation."

k. **Section (10)(d):** This establishes an entirely new procedure for the filing and resolution of campaign law complaints:

> "Any person may file a written complaint of a violation of any of the provisions of this Act with the Secretary of State, who shall immediately refer the complaint to an administrative law judge. The administrative law judge shall hold a hearing on the complaint within fifteen (15) days and shall render a final decision within fifteen (15) days of the hearing. The decision shall include any appropriate order, sanction, or relief authorized by statute. Upon motion, the complainant or defendant shall be granted extensions of up to thirty (30) days or longer upon showing of good cause. The decision of the administrative law judge shall be final and subject to review by the Court of Appeals as an agency decision in a contested case. The decision shall be enforced by the Secretary of State or the Attorney General. If neither of them enforces the decision within thirty (30) days of the decision becoming final, the complainant may bring a civil action in a representative capacity for the collection of the applicable civil penalty, payable to the State of Oregon."

Today, complaints are not heard by administrative law judges, there is no schedule for their determination by the agency, and their is no private cause of action for enforcement of a violation.

l. **Section (9)(c):** Campaign contributions not used in the campaign shall revert to the State Treasury to help pay for the Voters' Pamphlet.

Each of these 12 provisions is self-contained and complete. Whether or not Measure 47's numeric limits on campaign contributions are upheld, these provisions are clearly capable of being executed and thus are not void for lack of purpose. ***Vannatta***, 324 Or at 546.

3. IMPLEMENTATION OF MEASURE 47 IS NOT EXCUSED BY SECTION (9)(f).

Section (9)(f) is either a valid exercise of legislative power, or it is not. In either event, implementation of the rest of Measure 47 is not excused.

a. IF SECTION (9)(f) IS INVALID.

The summary judgment motion of Plaintiffs Horton and Lewis argues that Section (9)(f) of Measure 47 is not valid under the Oregon Constitution. Another argument that Section (9)(f) is invalid is presented in Center to Protect Free Speech's Answer and Cross-claim for Declaratory Judgment (January 10, 2007).

If Section (9)(f) is invalid, then Section (11), the severability clause, automatically severs Section (9)(f) from the remainder of Measure 47.[3] The remainder of Measure

---

3. For example, ***Advance Resorts of America, Inc. v. City of Wheeler*** 141 OrApp 166, 917 P2d 61, *review denied* 324 Or 322, 927 P2d 598 (Or 1996), ruled that (continued...)

47 is then to be implemented. That leaves Defendants with not even an asserted basis for refusing to implement and enforce the provisions of Measure 47 other than Section (9)(f).

b. IF SECTION (9)(f) IS VALID.

The Hazell Plaintiffs contend that Section (9)(f) is valid and does not afford Defendants an excuse for their refusal to implement and enforce Measure 47.

Section (9)(f) reads:

> 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.

(1) THE PREDICATE FOR TRIGGERING (9)(f) HAS NOT OCCURRED.

The operative portion of Section (9)(f) is not triggered, unless "on the effective date of this Act, the Oregon Constitution does not allow limitations on political campaign contributions or expenditures." No such determination has been made. In earlier cases, the Oregon Supreme Court examined specific sets of numeric limits on political campaign contributions and expenditures and found those numeric limits to be invalid. cite the 2 cases. This does not amount to a generic and all-encompassing

---

3.(...continued)
an emergency clause was severable and that its severance would not affect the validity of the remainder of the statute.

judicial determination to all limitations on political campaign contributions or expenditures are not allowed by the Oregon Constitution.

It is the legislature's province to enact laws. In the course of adjudicating disputes, courts are routinely called upon to interpret and apply statutes to particular cases.[4] Cases are decided upon "adjudicative facts" [Oregon Evidence Code (Rule 201(a)], subject to being proved by evidence. Thus, there is no judicial determination that utterly no limitations on political campaign contributions or expenditures is allowed in Oregon. The only determinations to date are that some of the limits in two earlier measures were invalid. Section 9(f) calls for an evaluation of whether "the Oregon Constitution does not allow limitations on political campaign contributions or expenditures." This is a generic question and is not tied to the specific numeric limitations in Measure 9 of 1994. So the condition precedent for triggering Section

---

4. Article III, section 1, of the Oregon Constitution provides:

> The powers of the Government shall be divided into three separate [*sic*] departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.

Article VII (Amended), section 1, of the Oregon Constitution provides:

> The judicial power of the state shall be vested in one supreme court and in such other courts as may from time to time be created by law.

Although that clause does not, by its terms, strictly address the separation of governmental powers, this court has acknowledged that a separation of powers concept inheres in those words. *Circuit Court v. AFSCME,* 295 Or 542, 547, 669 P2d 314 (1983).

(9)(f) has not occurred, and the "dormancy" period claimed by Defendants is not in effect.

In addition, the term "limitations" does not equate to only "numeric limits." The term "limitations" is not explicitly defined in Measure 47, but Section 9(d)(1) makes clear that the term is not limited to numerical limits. Section (9)(d)(1) distinguishes among "numeric limits or thresholds, percentage limits or thresholds, time periods, or age limits." The AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed 2000) defines "limitation" as:

1. The act of limiting or the state of being limited.
2. A restriction.
3. A shortcoming or defect.
4. Law: A specified period during which, by statute, an action may be brought.

Thus, a limit or restriction is not necessarily a numerical one.

Existing Oregon statutes contain many limitations on political contributions and expenditures that are not subject to credible constitutional challenge, such as:

1. If an entity or group (more than one person) makes any contribution or expenditure to support or oppose a candidate, it must register as a "political committee" and must file numerous reports detailing its contributions and expenditures. ORS 260.005(16), 260.063, 260.073.

2. If a person makes "independent expenditures" of more than $100 in the aggregate in a calendar year, to support or oppose any number of candidates, she must file a statement of independent expenditures with the appropriate elections officer within 7 days. ORS 260.044.

3. Contributions and expenditures above $300 per year can be lawfully made only if they are reported to the Secretary of State or local election officials. ORS 260.057 - .102.

3. Any and all contributions can be expended only on legitimate campaign purposes or to "defray an expenses incurred in connection with thr

recipient's duties as a holder of public office" and may not be pocketed for personal use. ORS 260.407.

Surely the above examples are "limitations on political campaign contributions or expenditures." Some of the examples are not numeric limits on the amounts of money that can lawfully be contributed or expended, but they are nevertheless limitations, and some of them contain numeric elements. There are no cases in Oregon striking down such limitations as inconsistent with the Oregon Constitution or with the U.S. Constitution. Thus, the statement "the Oregon Constitution does not allow limitations on political campaign contributions or expenditures" was not true on the effective date of Measure 47 and is not true today. That means that the predicate for triggering the dormancy portion of Section (9)(f) has not occurred, and Defendants' reliance upon Section (9)(f) for their refusal to implement any part of Measure 47 is unfounded.

Even if Section 9(f) were interpreted as call for an evaluation not of limits in general but only the specific limitations in Measure 47, such an evaluation requires litigation on the constitutionality of those specific limitations. As shown above, a duly-enacted statute is presumed to be constitutional, and the burden of proof is on the party asserting unconstitutionality. Until the unconstitutionality of each provision of Measure 47 is adjudicated, Defendants have no lawful basis for refusing to implement its terms.

Even so, Section (9)(f) envisions judicial determination of the validity of the limits contained in Measure 47. This suit seeks such judicial determination. Section (9)(f) of Measure 47, in concert with Section 11 of Measure 47, contemplates that the validity

under the Oregon Constitution of every provision of Measure 47 shall be determined by the courts. Implementation of the terms of Section 9(f) itself requires court determination on whether the Oregon Constitution allows either:

1. Any limitations whatever on political contributions or expenditures; or

2. Any of the specific limitations on political contributions or expenditures enacted by Measure 47.

Neither issue has ever been addressed by the Oregon courts.

D. THERE IS NO ADJUDICATED CHALLENGE TO THE PROVISIONS OF MEASURE 47 ESTABLISHING NUMERIC LIMITS.

Again, there has been no legal challenge to any of the provisions of Measure 47; Defendants on their own have merely refused to implement or enforce any of Measure 47, based on their assumption that some of the provisions transgress ***Vannatta***, *supra*. It is not the privilege of Defendants to refuse to implement and enforce a duly-enacted law, based merely on their assumption that some of it might later be found invalid under the Oregon Constitution. Thus, we need not examine the merits of whether the numeric limits in Measure 47 past muster under ***Vannatta***, *supra*, until and unless someone challenges the constitutionality of those limits. No such challenge has been filed.

Proving that each and every provision in Measure 47 is both pointless and not necessary, because all provisions in Measure 47 are presumed to be valid, until and unless the courts determine otherwise. Further, we do not know which specific

provisions to defend, or what to defend them against, as no specific claims of invalidity have been made against them.

If the court believes that examination of those merits is required at this time, however, we can offer some general themes in the nature of anticipated defenses.

E. *VANNATTA*'S EVALUATION OF MEASURE 9 OF 1994 DOES NOT APPLY TO INVALIDATE THE LIMITS IN MEASURE 47.

1. UNLIKE MEASURE 47, MEASURE 9 OF 1994 WAS NOT SUPPORTED BY LEGISLATIVE FINDINGS OF FACT.

The Oregon Supreme Court found Measure 9's limits invalid, in part due to the absence of legislative findings of fact setting forth the purposes of the limits. Due to the lack of such findings, the Court was able to disregard the rationales for Measure 9's limits and instead conclude only "that there is a debate in society over whether and to what extent such contributions indeed cause such a harm."

> [T]he "harm" that legislation aims to avoid must be identifiable from legislation itself, not from social debate and competing studies and opinions. Measure 9 does not in itself or in its statutory context identify a harm in the face of which Article I, section 8, rights must give way.

Vannatta, 324 Or at 539.

In contrast, Measure 47 contains extensive legislative findings of fact setting forth the harms resulting from the absence of limits on political contributions and expenditures and a complete rationale for the limits and why they serve compelling state interests.

The presence of extensive legislative findings of fact in Measure 47 is a fundamental difference from Measure 9 of 1994. Such legislative findings are entitled

to near complete deference by the courts. A successful initiative is a legislative act of the voters of this state. As such, it "is clothed with a presumption in its favor." ***Milwaukie Co. of Jehovah's Witnesses v. Mullen***, 214 Or 281, 292, 330 P2d 5, 74 ALR2D 347 (1958), *appeal dismissed and cert denied*, 359 US 436, 79 SCt 940, 3 LEd2d 932 (1959).

State ex rel. Van Winkle v. Farmers Union Co-op Creamery of Sheridan, 160 Or 205, 219-220, 84 P2d 471, 476-77 (1938), adopted the reasoning of ***United States v. Carolene Products Co.***, 304 US 144, 58 SCt 778, 82 LEd 1234 (1938), for defining the scope of its role in determining the weight to give legislative findings in determining the constitutionality of an Oregon law. Regarding "judicial inquiry into the validity of legislation," the Oregon Supreme Court adopted the highly deferential ***Carolene*** standard. "[B]y their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed afford support for it." ***Van Winkle****, supra*, quoting with approval, ***Carolene****, supra*.[5]

---

5. The ***Carolene*** standard of review remains robust as summarized in ***U.S. v. Calegro De Lutro****,* 309 FSupp 462, 465 (DCNY 1970):

> Although these [Congressional] findings do not preclude further examination by the court, ***Katzenbach v. McClung***, 379 US 294, 85 SCt 377, 13 LEd2d 290 (1964), they are entitled to considerable weight, ***United States v. Gainey***, 380 US 63, 66, 85 SCt 754, 13 LEd2d 658 (1965); ***Leary v. United States***, 395 US 6, 89 SCt 1532, 23 LEd2d 57 (1969), provided it appears that a rational basis underlay them. In determining the latter issue we are 'not concerned with the manner in which Congress reached its factual conclusions,' ***Maryland***

(continued...)

The Oregon Supreme Court has stated in reviewing a legislative finding, "whether this be true or not, we need not inquire. It is sufficient that it conceivably may be true; if so it furnishes a rational basis for the regulation." ***Savage v. Martin***, 161 Or 660, 682, 91 P2d 273, 281 (1939). Even if "the inferences supported by evidence are fairly debatable, judicial review will not disturb the legislative action." ***Smith v. Washington County***, 241 Or 380, 387, 406 P2d 545, 549 (1965). This is a majority view.

> "[T]he strong presumption in favor of the validity of an act of the legislature is well established, as is the tradition of judicial reluctance to look behind the statement of purpose and findings of fact set forth unless they are palpably without reasonable foundation." ***Akari House, Inc. v. Irizzary***, 81 Misc2d 543, 552, 366 NYS2d 955, 965 (1975).
>
> "[L]egislative findings of fact are entitled to a *prima facie* acceptance of their correctness." ***Basehore v. Basehore v. Hampden Indus. Development Authority***, 433 Pa 40, 48, 248 A2d 212, 217 (1968). "Such a rule is salutary for courts are not in a position to assemble and evaluate the necessary empirical data which forms the basis for the legislature's findings." *Id.*
>
> "Though not binding on the courts, legislative findings are given great weight and will be upheld unless they are found to be unreasonable and arbitrary." ***Amwest Surety Ins. Co. v. Wilson***, 11 Cal4th 1243, 1252, 48 CalRptr2d 12, 906 P2d 111 (1995).
>
> To successfully challenge a legislative judgment, a plaintiff "must convince the court that the legislative facts on which the [decision] is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." ***FM Properties Operating Co. v. City of Austin***, 93 F3d 167, 175 (5th Cir 1996).

5.(...continued)

> ***v. Wirtz***, 392 US 183, 190 n 13, 88 SCt 2017, 2021, 20 LEd2d 1020 (1968), and it is sufficient if Congress acted on the basis of 'common experience * * * (and) the circumstances of life as we know them.' ***Tot v. United States***, 319 US 463, 468, 63 SCt 1241, 1245, 87 L.Ed. 1519 (1943).

> "Absent a claim that legislative findings are irrational or have no bearing on a legitimate State purpose, they are not subject to judicial investigation." ***State ex rel. Ohio Cty. Comm'n v. Samol,*** 165 WVa 714, 275 SE2d 2 (1980).
>
> ***Moore v. Thompson,*** 126 So2d 543, 549 (Fla 1960) (courts will abide by legislative findings and declarations of policy unless they are clearly erroneous, arbitrary or wholly unwarranted).

In federal cases, legislative findings are entitled to great weight, provided it appears that there is any rational basis for them. ***United States v. Gainey***, 380 US 63, 66, 85 SCt 754, 13 LEd2d 658 (1965); ***Leary v. United States***, 395 US 6, 89 SCt 1532, 23 LEd2d 57 (1969).

2. UNLIKE MEASURE 9 OF 1994, MEASURE 47 CONTAINS SEVERABLE LIMITATIONS ON CAMPAIGN CONTRIBUTIONS AND/OR SPENDING BY CORPORATIONS AND UNIONS.

Oregon Supreme Court in ***Vannatta*** stated that there could be bans or limits on political contributions or spending by corporations and unions.

> But the right to spend money to encourage some candidate or cause does not necessarily extend to spending other people's money on a political message without their consent, whether that money comes from compulsory union fair share fees, a shareholder's equity, student activity fees, or dues paid to an integrated Bar.

Vannatta, 324 Or at 524. Measure 47, Sections (3) and (6), contains severable limitations on political contributions and expenditures by corporations and unions. These funds come from shareholder's equity and from union dues. No one has stated why such independently enforceable and severable limits are in violation of ***Vannatta***.

3. UNLIKE MEASURE 9 OF 1994, MEASURE 47 CONTAINS SEVERABLE LIMITATIONS ON CAMPAIGN CONTRIBUTIONS

AND/OR SPENDING BY CORPORATIONS AND UNIONS VALIDATED BY ARTICLE II, SECTION 22, OF THE OREGON CONSTITUTION.

Vannatta discusses Article II, Section 22, of the Oregon Constitution and concludes that it may well remove Article I, Section 8, protection for political contributions made by entities other than individuals residing inside the voting district of the candidate in question. 324 Or at 527. The reason the Court found that Article II, Section 2, did not validate the limits in Measure 9 of 1994 was:

> No party has separately argued for any partial application of Article II, section 22, to corporations, unions, or PACs. Article II, section 22, has been presented to us only in the form of an "all or nothing" pre-emption. As we have explained, that argument is not well taken.

324 Or at 527 n13. The Hazell Plaintiffs specifically do argue for partial application of Article II, Section 22, to validate all of the limitations in Measure 47 that do not pertain to individuals residing inside the voting district of the candidate receiving the contributions. Measure 47 contains many limitations on contributions and expenditures by corporations, unions, and other entities that are not individuals. These limitations are fully enforceable, independent of any limitations on political contributions by individuals or by individuals residing within each candidate's voting district.

F. *VANNATTA* NOT DOES INVALIDATE THE NUMERIC LIMITATION SYSTEM IN MEASURE 47.

The numeric limits in Measure 47 are different from those in Measure 9 of 1994. Measure 9 adopted static limits, but all numeric limits in Measure 47 are subject to the automatic adjustment clause, Section (9)(d):

> If, in the absence of this Section (9)(d), there would be entered in any court any order impairing the effectiveness of any provision of this Act on the ground that any of the numeric limits or thresholds, percentage limits or thresholds, time periods, or age limits specified in this Act conflict with the United States Constitution or Oregon Constitution, then we, the electors of Oregon, acting in our legislative capacity, hereby:
>
> (1) Increase the conflicting numeric limit or threshold by increments of one hundred dollars ($100) as many times as necessary to render it consistent with the constitution at issue;
>
> (2) Increase the conflicting percentage limit or threshold by increments of one percent as many times as necessary to render it consistent with the constitution at issue;
>
> (3) Increase or decrease the conflicting time period by increments of one day as many times as necessary to render that time period consistent with the constitution at issue; and
>
> (4) Decrease the conflicting age limit by increments of one year as many times as necessary to render it consistent with the constitution at issue;
>
> A prohibition shall be considered a numeric limit of zero.

Also, unlike Measure 9 of 1994, All of the limitations in Measure 47 are also subject to the "automatic narrowing" clause Section (9)(e), set forth *supra*.

Further, Measure 47 clearly does not prohibit expression. Everyone remains free to speak and to advocate the election or defeat of any candidate for any office.

Vannatta states:

> Finally, if the statute does not prohibit expression, then the statute is subject only to a vagueness challenge. ***Stoneman***, 323 Or at 543, 920 P2d 535.

324 Or at 536. No one has asserted that any part of Measure 47 is vague.

G. *VANNATTA* RELIED UPON FAULTY HISTORICAL ANALYSIS OF ARTICLE II, SECTION 8, OF THE OREGON CONSTITUTION.

Vannatta concluded that Article II, § 8, of the Oregon Constitution does not authorize limitations upon campaign expressions, but should be construed narrowly to allow regulation only of conduct which might impinge upon the act of voting. This analysis was not historically accurate.[6] It is thus appropriate to suggest

---

6. The ***VanNatta*** decision adopted the argument that "Article II, section 8, is addressed to 'elections,' not to 'political campaigns,' and:

> Given our reading of the term "elections," together with the scope of the concepts of "regulating" and "conducting" in Article II, section 8, the only way in which the Secretary of State's argument may prevail is if the concepts of "undue influence" and "other improper conduct," as used in Article II, section 8, are more expansive than the other two concepts. We think, however, that, when the phrase, "undue influence * * * from * * * other improper conduct," is read in the context of the other words and phrases of which it is a part, it will not support that reading.
>
> The clause directing the legislature to prohibit all undue influence in elections specifically enumerates the sources of influence that it considers to be "undue": "power, bribery, tumult, and other improper conduct." As we understand them, each of the first three enumerated examples is concerned specifically with the act of voting itself.

Vannatta, 324 Or at 532.

The Court then concluded that, under the doctrine of *ejusdem generis,* "because the first three listed items in the clause all appear to refer to conduct that interferes with the act of voting itself, rather than with the far broader concept of political campaigning, the last phrase [improper conduct] also should be read as being confined to that more narrow scope." *Id.* at 533.

reconsideration based upon "arguments that * * * present new information as to the meaning of the constitutional provision at issue." ***Stranahan v. Fred Meyer, Inc.***, 331 Or 38, 54, 11 P3d 228, 237 (2000).

It appears that the Court did not consider substantial case law from the first half of the 19th century which construed state constitutional provisions analogous and precursor to Article II, § 8, as authorizing a host of civil sanctions against candidate and third party expenditures and expressions during races among candidates for political elective office which had the *potential* of biasing voters. The harm of biasing voters was not limited to acts of overt coercion aimed at them ("power, tumult, bribery"). It was understood that improper influence need not be a direct assault on the casting of the ballot ("elections") but could be comprised of campaign conduct and financial transactions such as third-party wagering and indirect efforts to influence voters).[7] Examples of undue influence noted years before the adoption of the Oregon Constitution included pre-election day expressions such as "perversion of facts" and "circulating falsehoods." ***Bettis v. Reynolds***, 12 Ired 344, 34 NC 344, 1851 WL 1199, 1-2 (1851). Third-party financial interests in the outcome of the election were deemed inimical to unbiased voting regardless of whether the monied interest was a voter.

The concern over the pernicious influence of money has deep roots in colonial law. Stat 2 *Geo.* 2, ch. 24, forbid expenditures which amounted to bribery in elections

---

7. The early statutes also forbid candidate dueling, which was campaign conduct not related to direct coercion of voters but was deemed inimical to the process of seeking office.

for members of Parliament. In 1695, Virginia limited candidate expenditures deemed improper and distinct from criminal bribery. In 1790 Virginia went further and prohibited legislative candidates from using any "reward" "to promote their election." 1 VA REV CODE 389 (1790). This statute was noted with approval in ***Barker v. People***, 3 Cow 686, 15 Am Dec 322, (Supreme Ct NY 1824).

Also, in New York at the turn of the nineteenth century:

> The legislature, in the act for regulating elections, (24 Sess ch 10 § 17) evince a disposition to guard them from undue influence, by prohibiting bribery, menace, or any other *corrupt means or device, directly or indirectly*, to influence an elector [1 Rev Stat 149]. They intended that the suffrages of the people should be, as far as possible, free and unbiassed [*sic*].

Lewis v. Few, 5 Johns 1, NY Supp (1809) (emphasis supplied). Both New York and Virginia had Constitutional analogs to Article I, § 8 in place prior to the adoption of the Oregon Constitution. The cases cited were decided before Oregon adopted the same language (as found in the Indiana Constitution). See § G.1(2) *post*.

Years before the Oregon Constitutional Convention, the North Carolina Supreme Court in 1851 held that it was "self-evident" that state and federal Constitutions at that time forbid conduct which had the "tendency, in any way" to "unduly influence elections."

> Ours, both Federal and State, are representative, republican governments, and rest upon elections by the people, as “the corner stone.” Everything, not merely the proper action, but the very existence, of our institutions, depends on the free and unbiased exercise of the elective franchise; and it is manifest, that whatever has a tendency, in any way, unduly to influence elections, is against public policy. This position we assume, as self-evident. It seems equally clear, that the practice of betting on elections has a direct tendency to cause undue influence. For, by the wager, the parties acquire a pecuniary interest in the election, altogether foreign, and at war with its

> true purpose and design, which leads them into temptation, more or less strong, according to the amount of the wager, to exert every and any means, by which to effect the result, and to strengthen one side and weaken the other. One, who has a wager depending, follows but the instinct of interest, when he resorts to the perversion of facts, the circulation of falsehood, treating and bribing, for the purpose of gaining votes. The evil is not confined to himself. His relations and friends become excited and stimulated to exercise, not for the *good of the country,* but for the pecuniary interest growing out of the wager. Such a state of things is against the public good.
>
> Putting our decision on this broad ground, the fact that the parties to the wager are not voters, has no bearing on the question; because the evil effects of the practice of betting on elections, pointed out above, do not at all depend on that circumstance. One who is not a voter, may be tempted as strongly as one who is a voter, to pervert facts, circulate falsehoods, treat and bribe, and the infection extends as readily to his relatives and his friends.

Bettis v. Reynolds, 12 Ired 344, 34 NC 344, 1851 WL 1199, 1-2 (1851). (Emphasis in original).

Oregon's election system, pre-Measure 47, also allows parties to "acquire a pecuniary interest in the election" of far greater magnitude than the payoff from a simple bet. Corporations, unions, and wealthy individuals have huge stakes the outcome of Oregon elections. Hence, they contributed tens of millions of dollars to candidates in the 2006 election cycle, breaking previous contribution and spending records. The two major party candidates for Governor spent over $13.3 million, up from $8.8 million in 2002 and $2.3 million in 1998.[8] This merely continues the

---

8. National Institute on Money in State Politics, at:

> http://www.followthemoney.org/database/StateGlance/state_candidates.phtml?si=199837#governor

(continued...)

escalation in campaign contributions that since 1996 has increased the sums spent on candidate campaigns in Oregon by more than a factor of ten.[9]

Vannatta also did not discuss the implications of the fact the Oregon had stringent limits on political campaign contributions and expenditures in place during a 65-year period between 1908 and 1973. Those limits were enacted by initiative in 1908 and was referred to as the "Corrupt Practices Act Governing Elections."

> Almost 100 years ago, in 1908, Oregon voters established campaign contribution and expenditure limits through an initiative. In the first few decades only the candidate and immediate family members could contribute and spend campaign funds, and the amounts were strictly limited based on a percentage of the annual salary for the elected office. The Legislature

---

8.(...continued)

> http://www.followthemoney.org/database/StateGlance/state_candidates.phtml?si=200237#governor
>
> http://www.followthemoney.org/database/StateGlance/state_candidates.phtml?si=200637#governor

The numbers for 2006 may be too low, as the NIMSP states that its database for 2006 is, as of now, only 53% complete for the 2006 cycle.

We request judicial notice of these readily ascertainable facts. ORS 40.060.

9. National Institute on Money in State Politics, at:

> http://www.followthemoney.org/database/state_overview.phtml?si=199637
>
> http://www.followthemoney.org/database/state_overview.phtml?si=200637

The overall number for 2006 is too low, as the NIMSP states that its database for 2006 is, as of now, only 53% complete for the 2006 cycle.

We request judicial notice of these readily ascertainable facts. ORS 40.060.

adjusted the dollar amounts in 1957 and made additional modifications in 1971.

By 1973, the Legislature was ready to enact a more detailed campaign finance reform package focused on expenditures. It placed limits on total expenditures by individual candidates based on the office being sought and the number of registered voters eligible to vote for that office in the previous general election. Believing that expenditures were the key to controlling campaign costs, the Legislature repealed previous contribution limits. Legislators also adopted a bill to restrict independent expenditures, which are campaign efforts produced and distributed independently of the candidate.

Warren Deras, a 1974 primary election candidate, sued the Secretary of State, Clay Myers, on the grounds that the new election reforms were unconstitutional (Deras v. Myers, 1975). A lower court found that the expenditure limits were constitutional but that the restrictions on independent expenditures were not. The expenditure limits remained in place during the 1974 general election after an appeal to the Supreme Court. In May 1975, the Oregon Supreme Court found both the spending limits bill and the independent expenditure restrictions unconstitutional.

League of Women Voters of Oregon, CAMPAIGN FINANCE REFORM IN OREGON (2004)

(available at www.lwvor.org/documents/CFR2004.pdf).

The ballot title of the 1908 initiative read:

A Bill for a law to limit the amount of money candidates and other persons may contribute or spend in election campaigns; to prohibit and punish the corrupting use of money and undue influence in elections; to protect the purity of the ballot and furnish information to voters concerning candidates and all political parties, partly at public expense.

Nickerson v. Mecklem et al., 169 Or 270, 278 126 P2d 1095 (1942).

The Corrupt Practices Act (Ch. 3, Laws of Oregon for 1909) is entitled: "An act to propose by initiative petition a law to limit candidates' election expenses; to define, prevent and punish corrupt and illegal practices in nominations and elections; to secure and protect the purity of the ballot; to amend section 2775 of Bellinger and Cotton's Annotated Codes and Statutes of Oregon; to provide for furnishing information to the electors and to provide the manner of conducting contests for nominations and elections

> in certain cases." While there have been some amendments to the act-attention to which will be later directed-the title has remained the same since its original enactment in 1909.

Id. at 274. Note that the ballot title refers to "the corrupting use of money and undue influence in elections." This language was clearly used to refer to the use of money in political campaigns, not merely in the act of filling out a ballot or voting. The title of the statute includes to "limit candidates' election expenses," again using the term "elections" to refer to the process of campaigning for office. The candidates' expenses are obviously for their campaigns, not for functions tied to administering elections.

When an interpretation has been known for decades, has been applied, and the legislature has not intervened, the doctrine of contemporaneous interpretation requires that the long-established interpretation continue and prevail. See 2 SUTHERLAND, STATUTORY CONSTRUCTION, pp 514-515, § 5104 (3d ed). The doctrine applies where a contemporaneous interpretation of a statute or constitution is one made at or soon after the time of its enactment and where such contemporaneous and practical interpretation has continued for a considerable length of time. *Id*. at 520, 522. The doctrine has long been the rule in Oregon. ***Union Pac. R. R. Co. v. Anderson***, 167 Or 687, 709, 120 P2d 578 (1941):

> Here the construction of the law, or perhaps it might be more accurate to say the application of a provision of the law to a particular state of facts, has been by those who are governed by its provisions in a special and immediate way, and on the part of the defendants there has been acquiescence for this period in the position assumed by the plaintiff.

In ***Butler v. State Indus. Acc. Commission*****,** 212 Or 330, 340, 318 P2d 303, 308 (1957), the Court rejected a novel interpretation of workers compensation coverage, because the prevailing interpretation had been unchallenged for many years without legislative intervention:

> This has been the interpretation for some 40 years, and that it has been put into effect in numerous school districts. At recurring sessions of the legislature the Workmen's Compensation Law has been amended and revised, but this practice has not been disturbed. On a question as close as this, upon the decision of which very grave public consequences may depend, we think that the contemporaneous, administrative interpretation over a long period of time should turn the scale. ***City of Portland v. Duntley***, 185 Or 365, 385, 203 P2d 640; ***Union Pac. R. R. Co. v. Anderson***, 167 Or 687, 709, 120 P2d 578; ***Kelly v. Multnomah County***, 18 Or 356, 359, 22 P 1110; 2 SUTHERLAND, STATUTORY CONSTRUCTION (3d ed.) 525-526.

Accord, ***Standard Ins. Co. v. State Tax Commission***, 230 Or 461, 469, 370 P2d 608, 611-612 (1962) (tax code interpretation went "unchallenged and unquestioned for more than twenty years by defendant").

H. *VANNATTA* FAILED TO RECOGNIZE THAT THE OREGON "FREE SPEECH" CLAUSE WAS ADOPTED FROM INDIANA, AND INDIANA HAS STRICT LIMITS ON POLITICAL CAMPAIGN CONTRIBUTIONS AND EXPENDITURES.

Article I, Section 8, of the Oregon Constitution was adopted verbatim from the Indiana Constitution. Claudia Burton and Andrew Grade, *A Legislative History of the Oregon Constitution of 1857-Part I,* 37 WILLAMETTE L REV 469, 526 (2001) *See, e.g.,* remarks of convention delegate Delazon Smith advocating the inclusion of a bill of rights in the Oregon Constitution and characterizing the Indiana Constitution of 1851 as the "best pleas[ing]" "of all the constitutions of all the states"). Charles H. Carey,

THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857, p. 101-2 (1926).

Although no precise record of the debates and proceedings of the Oregon Convention of 1857 exists, the Oregon Supreme Court has taken note of the many identical provisions in the Indiana and Oregon Constitutions. It has reasoned that the members of that Convention were mindful of the proceedings of the Indiana Convention that produced the Indiana Constitution of 1851 and inquired why "provisions of the same tenor are in most every state constitution," ***Monaghan v. School Dist. No. 1***, 211 Or 360, 364, 315 P2d 797, 800 (1957), in construing the meaning of the common provisions. *Id*. Intent is determined by giving words the same meaning that the framers would have ascribed to them at the time and reviewing the historical circumstances that led to their creation. ***Priest v. Pearce***, 314 Or 411, 416, 840 P2d 65 (1992). Older cases also looked to Indiana decisions on cognate provisions of the Oregon Constitution. ***City of Portland v. Hirsch-Weis Mfg. Co.***, 123 Or 571, 578, 263 P 901, 903 (1928).

Thus, Oregon's free speech amendment was imported from Indiana. Indiana for decades has had limitations on political contributions. As of 2002, Indiana had very strict limits on campaign contributions by corporations and unions, as outlined in Attachment A to the Declaration of Daniel Meek (FEC's summary of Indiana campaign finance laws). In particular, the Federal Election Commission (FEC) states:

> **Limitations on Amounts of Contributions.** Corporations and labor organizations are limited to total political contributions, in any calendar year, of an aggregate of $5,000 apportioned in any manner among all candidates

> for state offices (including a judge of the court of appeals whose retention in office is voted on by a district that does not include all of the state) [56]; an aggregate of $5,000 apportioned in any manner for the political party state committees [57]; an aggregate of $2,000 apportioned in any manner for all candidates for state senate [58]; an aggregate of $2,000 apportioned in any manner for all candidates for state house [59]; an aggregate of $2,000 apportioned in any manner among regular party committees organized by a legislative caucus of the state senate [60]; an aggregate of $2,000 apportioned in any manner among regular party committees organized by a legislative caucus of the state house of representatives [61]; and an aggregate of $2,000 apportioned in any manner for all candidates for school board offices and local offices [62]; and an aggregate of $2,000 apportioned in any manner among all central committees other than state committees [63].

FEC, CAMPAIGN FINANCE LAW 2002: SUMMARY OF STATE CAMPAIGN FINANCE LAWS (2004).[10] Thus, Indiana limits every corporation and labor organization to a grand total of only $5,000 per year in political contributions pertaining to all statewide offices. This contrasts with Oregon. In the last year in which a Governor was elected and full data is available (2002), one union contributed over $1.1 million in candidate races, another contributed over $519,000, another contributed over $371,000, and so on. Individual corporations contributed to candidate committees as much as $250,000 (Clebob Seattle Investments) or $221,000 (Seneca Jones Timber) or to candidate committees. Dozens of individual corporations each contributed in excess of $20,000 to candidate committees, not to mention their contributions to political committees and political parties also designed to support or oppose candidates. Individual persons contributed to candidates as much as $440,000 (Loren Parks) or $261,000 (Betty

---

10. This publication is available at http://www.fec.gov/pubrec/cfl/cfl02/cfl02.shtml.

Roberts) or $257,550 (Joan Austin) or $242,500 (Rodereick Wendt) or $188,000 (Richard Wendt) and so on.[11]

I. *VANNATTA* FAILED TO RECOGNIZE THAT THE OREGON "FREE SPEECH" CLAUSE IS COMPLETELY OR FUNCTIONALLY IDENTICAL TO THOSE IN 28 OTHER STATES, 27 OF WHICH HAVE LIMITS ON POLITICAL CONTRIBUTIONS AND EXPENDITURES.

Of the 49 other states, 27 of them have "free speech" either identical or Oregon's or functionally identical. Each of them declares that every person has the right "to speak, write, or print freely on any subject." Some of them use the word "publish" instead of "print," but they are otherwise the same as Oregon's.[12]

---

11. All of these figures are documented by the National Institute on Money in State Politics, at:

    http://www.followthemoney.org/database/state_overview.phtml?si=200237#top20_cand

    http://www.followthemoney.org/database/StateGlance/contributor_details.phtml?si=200237&page=contributor&view=View&CD=29

    http://www.followthemoney.org/database/StateGlance/contributor_details.phtml?si=200237&page=contributor&view=View&CD=215

    We request judicial notice of these readily ascertainable facts. ORS 40.060.

12. This is documented in the Declaration of Daniel W. Meek by a printout of a Westlaw search for the relevant terms.

Alaska	Kentucky	North Dakota
Arizona	Maine	Ohio
California	Michigan	Oklahoma
Connecticut	Minnesota	Pennsylvania
Delaware	Nebraska	South Dakota
Idaho	Nevada	Tennessee
Illinois	New Jersey	Virginia
Indiana	New Mexico	Washington
Kansas	New York	Wisconsin
		Wyoming

Of these other 27 states, 26 have numeric limits on political contributions; only New Mexico does not.[13] Counsel has located no cases striking down any of those limits on grounds of inconsistency with a state constitution's "free speech" clause. To the best of counsel's knowledge, none of these limits have been struck down under authority of these state constitutions. Use of Westlaw has produced not a single case in which the courts of another state have favorably cited ***Vannatta*** for the proposition that this free speech language in any way limits the power of the state to prohibit or restrict political campaign contributions. Various legal encyclopediae list the Oregon case as the only example of campaign contribution limits having been invalidated on the basis of a state constitution. See, e.g., *Constitutional Validity of State or Local Regulation of Contributions by or to Political Action Committees*, 2003 ALR 5TH 21 (originally published in 2003), 2003 WL 22287578.

---

13. Federal Election Commission (FEC), CAMPAIGN FINANCE LAWS 2002, Chart 2A (http://www.fec.gov/pubrec/cfl/cfl02/cfl02chart2a.htm). Describing or summarizing the status of the law is not a "fact." But, if necessary, we request judicial notice. ORS 40.060.

J. IF NECESSARY, *VANNATTA* SHOULD BE RECONSIDERED AND REVERSED.

The ***Vannatta*** approach to applying free speech rights to political campaign contributions and expenditures has, to our knowledge, never been adopted by any other government in the United States, on any level. We respectfully suggest that the Oregon courts should adopt the approach of the United States Supreme Court and every other state supreme in applying free speech rights to limits on campaign contributions and expenditures. Apart from Oregon, we have not located any state supreme court that has adopted a different analysis or any state court decision that has invalidated any limits on political contributions on the basis of a state constitution's free speech clause, despite the fact that 27 other states have free speech clauses essentially identical to Oregon's.

1. OREGON SUPREME COURT DECISIONS ARE SUBJECT TO LATER REVERSAL.

This is the lesson of ***Stranahan v. Fred Meyer, Inc.***, *supra*.

2. VANNATTA RELIED UPON AN INCORRECT ANALYSIS OF FREEDOM OF SPEECH.

This particular subject could fill volumes. As no one has challenged the validity of the Measure 47 limits on free speech grounds, our presentation of the volumes must await some attack to defend against.

In general, however, we would urge adoption of the "free speech" approach to political campaign contributions and expenditures adopted by the United States Supreme Court and by, apparently, every state supreme court other than Oregon's.

The Measure 47 limits on political contributions and expenditures are not content-based. The act of giving money does not have content. If it did, then Oregon could not lawfully impose its full panoply of laws requiring disclosure and reporting of political campaign contributions and expenditures, as such restrictions would apply only to "political speech" and thus be forbidden content-based restrictions. The Oregon Supreme Court has not explained why Article I, Section 8, does not allow numeric limits but does allow all sorts of other limitations, such as requirements that no contributions be accepted and no expenditures be made, except those which are reported to government officials on a specified schedule. Why are those limitations not also aimed at the content of political speech and thus prohibited by Article I, Section 8? Like numeric limits on political contributions, the reporting requirements apply only to expenditure of funds on "political speech." ***Vannatta*** thus proves too much and logically requires the invalidation of all campaign finance disclosure and reporting requirements.

Measure 47 does not apply to the content of the speech. It does not stop candidates or anyone else from saying anything. It just stops corporations and unions and others from providing money to enlarge the dissemination of the candidate's speech. That money provides an overwhelming megaphone for the speech of those candidates who attract the contributions.

Under Measure 47, all persons are free to use 100% of their volunteer time and effort to support or oppose candidates. But there are limits on amounts of money that can be contributed to candidates, political committees, and political parties for that purpose. Under Measure 47, everyone has access to the soapbox, but the soapbox does not come with a 10,000,000-watt amplified speaker system that drowns out everyone else.

The following two pages display graphs showing the Current Oregon Political Money System and the Measure 47 system. Note that neither system places restrictions on "communication to voters." As in the current system, communication to voters (to support or oppose candidates) is done by candidate committees and by every other person and entity through "independent expenditures." Measure 47 does not intrude upon the content of such communications. Instead, Measure 47 imposes restrictions on the sources of money used to pay for whatever communication is desired by any person or entity. Every judicial system in the United States has found such restrictions to be consistent with both federal and state freedom of speech guarantees. Except Oregon.

We are not aware that any other court in the United States views restrictions on political contributions to be restrictions on the content of speech that are not allowed by free speech provisions, including the First Amendment. Often attributed to the United States Supreme Court heard is the phrase "Money equals speech." The United States Supreme Court has never endorsed that statement. To the contrary, Justice Stevens has expressly rejected it: "Money is property; it is not speech."

Nixon v. Shrink Missouri Government PAC, 528 US 377, 398 (J. Stevens, concurring).

> On the one hand, a decision to contribute money to a campaign is a matter of First Amendment concern--not because money is speech (it is not); but because it enables speech. Through contributions the contributor associates himself with the candidate's cause, helps the candidate communicate a political message with which the contributor agrees, and helps the candidate win by attracting the votes of similarly minded voters. ***Buckley v. Valeo***, 424 U.S. 1, 24-25, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam). Both political association and political communication are at stake.
>
> On the other hand, restrictions upon the amount any one individual can contribute to a particular candidate seek to protect the integrity of the electoral process--the means through which a free society democratically translates political speech into concrete governmental action. See id., at 26-27, 96 S.Ct. 612; ***Burroughs v. United States***, 290 U.S. 534, 545, 54 S.Ct. 287, 78 L.Ed. 484 (1934) (upholding 1925 Federal Corrupt Practices Act by emphasizing constitutional importance of safeguarding the electoral process); see also ***Burson v. Freeman***, 504 U.S. 191, 199, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992) (plurality opinion) (recognizing compelling interest in preserving integrity of electoral process). Moreover, by limiting the size of the largest contributions, such restrictions aim to democratize the influence that money itself may bring to bear upon the electoral process. Cf. ***Reynolds v. Sims***, 377 U.S. 533, 565, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (in the context of apportionment, the Constitution "demands" that each citizen have "an equally effective voice"). In doing so, they seek to build public confidence in that process and broaden the base of a candidate's meaningful financial support, encouraging the public participation and open discussion that the First Amendment itself presupposes. See ***Mills v. Alabama***, 384 U.S. 214, 218-219, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966); ***Whitney v. California***, 274 U.S. 357, 375-376, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring); A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 24-27 (1948).

Id. at 400-01 (JJ Breyer, Ginsburg, concurring).

3. THE VANNATTA DECISION IS LESS THAN 10 YEARS OLD AND THIS IS THE FIRST CASE FOR WHICH IT IS CLAIMED TO BE PRECLUSIVE ON CAMPAIGN FINANCE LIMITS.

State v. Ciancanelli, 339 Or 282, 290-291, 121 P3d 613, 618 (2005), explained that, even if proponent succeeds in showing that a precedent was not correctly decided, that proponent must also persuade the Court that overturning the challenged precedent would not be disruptive:

> The most common such consideration is time. Many decisions of this court serve as precedent in later decisions. Thus, disavowing one case may undermine the precedential significance of several others. The contrast between ***Stranahan*** and this case illustrates the foregoing principle. In ***Stranahan,*** the allegedly erroneous decision had been rendered less than 10 years earlier, and few intervening precedents had relied on the earlier case, ***Lloyd Corporation v. Whiffen,*** 315 Or 500, 849 P2d 446 (1993). The ***Stranahan*** majority simply acted at the earliest possible moment to correct what it perceived to be an analytical mistake made in the immediately preceding case, ***Lloyd Corporation.*** The present case, by contrast, involves a challenge not only to ***Robertson,*** but also to the many cases that this court has decided since 1983 that have utilized its methodology.

Plaintiffs submit that "when the passage of time and the precedential use of the challenged rule is factored in, overturning the rule will not unduly cloud or complicate the law." ***State v. Ciancanelli***, *supra*, 339 Or at 291. Here, as in ***Stranahan***, the disputed decision, ***Vannatta v. Keisling*****,** was rendered 10 years ago (February 1997). There has not been any intervening precedent which has relied on that case to strike down numerical campaign finance limits. This case then presents the first opportunity, "the earliest possible moment," to correct what is argued to be an incomplete analysis in the immediately preceding case.

IV. THE HAZELL PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR SECOND CLAIM FOR RELIEF (Injunctive Relief).

The Second Claim seeks injunctive relief upon the same basis as the declaratory relief sought in the First Claim.

As alleged in the Complaint, the Hazell Plaintiffs and other Oregon residents and electors are irreparably harmed by Defendants' refusal to administer and enforce the provisions of Measure 47 other than their incorrect interpretation of Section (9)(f), in at least these ways:

1. They are harmed by deprivation of their right to enact legislation pursuant to the initiative process under Article IV of the Oregon Constitution.

2. They are harmed by the continuing undue influence of monied interests in all state and local political campaigns for public office, as documented in the legislative findings of fact set forth in Section (1) of Measure 47.

3. They are harmed by the continuing lack of timely disclosure and publication of information on the sources of money used by campaigns for state and local public office in Oregon, as documented in the legislative findings of fact set forth in Section (1) of Measure 47.

Pursuant to ORS 28.080, ORS 183.486(1), ORS 183.490, and ORS 246.910, *inter alia*, the Hazell Plaintiffs are entitled to, and hereby seek, a order directing Defendants to administer and enforce all provisions of Measure 47, as of December 6, 2007. In the alternative, the Hazell Plaintiffs seek an order directing Defendants to administer and enforce all provisions of Measure 47, as of the date of the court's order.

V. CONCLUSION.

Based on the materials on file in the record of this case, and the discussion and authority herein, this Court should grant summary judgment on the Hazell Plaintiffs' First and Second Claims for Relief.

The Hazell Plaintiffs seek an order:

1. Declaring that:
    a. The Secretary is obligated to administer and enforce each and all of the provisions of Measure 47.
    b. The Attorney General is obligated to administer and enforce each and all of the provisions of Measure 47.
2. Ordering that the Secretary and Attorney General administer and enforce all provisions of Measure 47.
3. After a decision on the merits, awarding fees under the First and/or Second claims for relief under the authority of ***Deras v. Myers***, 272 Or 47, 535 P2d 541 (1975); ***Armatta v. Kitzhaber***, 327 Or 250, 959 P2d 49 (1998); ***Lehman v. Bradbury***, 334 Or 579, 583, 54 P3d 591 (2002); and ***Swett v. Bradbury***, 335 Or 378, 67 P3d 391 (2003).
4. After a decision on the merits, awarding fees and costs on the Second Claim for relief under ORS 183.497.

5. Granting such other relief the Court deems appropriate.

Dated: February 16, 2007

Respectfully Submitted,

DANIEL W. MEEK
OSB No. 79124
10949 S.W. 4th Avenue
Portland, OR 97219
503-293-9021 voice
503-293-9099 fax
dan@meek.net

Attorney for Plaintiffs
Bryn Hazell, Francis Nelson, Tom Civiletti, David Delk, and Gary Duell

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing:

MOTION FOR SUMMARY JUDGMENT BY PLAINTIFFS HAZELL, NELSON, CIVILETTI, DELK, AND DUELL AND SUPPORTING MEMORANDUM

DECLARATION OF BRYN HAZELL

DECLARATION OF DANIEL W. MEEK

by (1) e-mail and (2) first class mail to all parties listed below, deposited in the U.S. Postal Service at Portland, Oregon, with first class postage prepaid.

John DiLorenzo
Davis Wright Tremain LLP
1300 S.W. 5th Avenue #2300
Portland, OR 97201
503.241.2300
johndilorenzo@dwt.com

Hardy Myers
David Leith
Oregon Department of Justice
1162 Court Street N.E.
Salem, OR 97301-4096
503.378.6313
David Leith@doj.state.or.us

Dated: February 16, 2007

_____
Daniel W. Meek