

**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,**

**and**

**CENTER TO PROTECT FREE  
SPEECH, INC., an Oregon nonprofit  
corporation, and FRED VANNATTA,**

**Intervenor-Defendants and  
Cross-Claimants.**

**Case No. 06C-22473**

**HORTON PLAINTIFFS SURREPLY  
MEMORANDUM SUPPORTING  
SUMMARY JUDGMENT FOR  
PLAINTIFFS**

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

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For Plaintiffs Horton and Lewis

Plaintiffs Horton and Lewis [hereinafter "Horton" or "Horton Plaintiffs"] moved for an order granting summary judgment on the merits of their Third and Fourth Claims for Relief. In the memorandum below, they respond to the Defendants' Reply Memorandum in Support of Motion for Summary Judgment (April 20, 2007) [hereinafter "Defendants' Reply Memorandum"] and to Intervenor-Defendants/Cross-Claimants' Memorandum in Opposition to Plaintiffs' and Defendants' Motions for Summary Judgment, etc. (March 30, 2007). They also adopt and incorporate fully by reference the memorandum filed today by the Hazell Plaintiffs, except the Hazell Plaintiffs' argument that Section (9)(f) of Measure 47 is valid.

Defendants again fail to address the Horton Plaintiffs' principle argument: that Section (9)(f) fails because it does not "anticipate" an actual event in the sense that word has been used to approve statutes which remain dormant until a future event occurs. We agree with Defendants that the language in Section (9)(f) is similar to underlying statutory language at issue in *State v. Hecker*, 109 Or 520, 221 P 808 (1923). The fact is, however, in *Hecker*, and in each case we have found thus far, the contingent language was upheld because the contingency was expressed in terms of an actual anticipated event which was already fixed or was stated as the outcome of a particular election.

The question of first impression presented here is whether an Oregon statute can be contingent upon an indefinite potential occurrence, instead of an anticipated actual event. Can the language of Section (9)(f) support a general, indefinite suspension? If the referred constitutional amendment underlying the *Hecker* appeal had failed, then

would the statutes passed in April 1920 relating to the implementation of the death penalty have remained suspended until some later amendment was passed re-authorizing the death penalty?

The following table summarizes circumstances where statutes were held properly adopted in "anticipation" of a specific event.

CASE	STATUTE	ACTUAL AND ANTICIPATED EVENT
<b><i>Druggan v. Anderson</i></b> , 269 US 36, 46 SCt 14, 70 LEd 151 (1925)	Congress passed the National Prohibition Act in 1916, provided that it was not to go into effect until after the 18th Amendment (which had been ratified) went into effect	January 16, 1917, the effective date of the Eighteenth Amendment ratified in 1916
<b><i>Libby v. Olcott</i></b> , 66 Or 124, 134 P 13 (1913)	1913 Legislature passed a number of laws and authorized a special election for November 1913, should any referendum be taken	Outcome of special November 1913 election
<b><i>State v. Hecker</i></b> , 109 Or 520, 221 P 808 (1923)	Statutes passed by legislature, April 1920, relating to implementing death penalty suspended until outcome of election on the proposed amendment referred by same legislative session	Outcome of the May 1920 election on referred amendment
<b><i>Marr v. Fisher</i></b> , 182 Or 383, 187 P2d 966 (1947)	Legislature passed statutes in April 1947 relating to income tax exemptions contingent upon voter approval or rejection of a Sales Tax Act constitutional amendment referred by same session	Outcome of the November 1947 election on referred amendments
<b><i>Neisel v. Moran</i></b> , 80 Fla 98, 85 So 346 (1919)	Statues adopted December 1918 regarding alcohol sales and manufacture to become effective same specific date that already-adopted Constitutional Amendment took effect	January 1, 1919, the effective date of Constitutional amendment outlawing alcohol sales previously adopted in 1918

CASE	STATUTE	ACTUAL AND ANTICIPATED EVENT
<b><i>Alabam's Freight Co. v. Hunt</i></b> , 29 Ariz 419, 422-23, 242 P 658 (1926)	1933 Workers Compensation statute contingent on passage of constitutional amendment referred to voters in the same act	Outcome of November 1933 election on proposed Constitutional amendment
<b><i>Woodahl v. Straub</i></b> , 164 Mont 141, 520 P2d 766, <i>cert denied</i> , 419 US 845, 95 SCt 79, 42 LEd2d 73 (1974)	Statutes adopted by the 1973 legislature relating to tax changes authorized by 1972 Constitutional Amendment	July 1, 1973, the effective date of the 1972 Constitutional Amendment allowing certain taxation
<b><i>Henson v. Georgia Indust. Realty Co.</i></b> , 220 Ga 857, 142 SE 2d 219 (1965)	Statutes adopted by 1952 Legislature relating to special or local laws contingent upon referral to voters by same legislative session	Outcome of November 1952 election on Constitutional amendment
<b><i>Busch v. Turner</i></b> , 26 Cal 2d 817, 161 P2d 456 (1945)	1943 statutes relating to certain wartime powers, raising salaries for certain offices passed	1944 Constitutional amendment relation to legislative powers during wartime
<b><i>Application of Okla. Indus. Fin. Auth.</i></b> , 360 P2d 720 (Okla 1961)	July 1959 enabling legislation to create State Industrial Finance Authority contingent upon outcome of constitutional amendment referred for vote by same legislative session	Outcome of the July 1960 election to be held

The circumstances in the foregoing authority, including ***Hecker***, are thus on the facts decidedly different from that presented by Section (9)(f) and Measure 47. Here, there is no specific constitutional amendment "anticipated," only a hope that someday a constitutional amendment may be offered to voters and may be enacted.

The Horton Plaintiffs have previously argued that a later constitutional amendment can indeed revive Measure 47 (Motion for Summary Judgment by

Plaintiffs Horton and Lewis on Their Claims and Motion for Summary Judgment on Intervenor's Cross-Claim, pp. 7-8), so long as those later voters evidence an intent to so enable a dormant statute, as held in ***Northern Wasco County People's Utility Dist. v. Wasco County***, 210 Or 1, 12-13, 305 P2d 766 (1957). The applicable rule is set out in 16 CJS, *Constitutional Law*, § 45, as follows:

A constitutional provision may ratify and validate a previously enacted statute, but it will not so operate unless an intention to do so is clearly manifested. \* \* \* A constitutional provision, which from the language used shows expressly or by necessary implication that it was intended to operate retrospectively by validating antecedent unconstitutional legislation, renders valid all such legislation to which the constitutional provision relates, without reenactment by the legislature.

*Id.* In ***Banaz v. Smith***, 133 Cal 102, 65 P 309 (1901), the California Supreme Court expressed the policy reasons against contingency upon indefinite events and "generic" revival of statutes without specificity.

[I]t would be to enact a law to which no reference was made, and which the people in adopting the amendment could not have had in mind. Such is not the ordinary function of a constitutional provision, and such effect will not be given to it unless it is expressly so provided.

Since reviving a dormant statute will require an expression of intent to do so by the later voters, the language now contained in Section (9)(f) becomes mere surplusage and is subject to severance by Section (11).

## **CONCLUSION**

For the reasons and authority cited above, and in our earlier memoranda, the court should grant the Motion for Summary Judgment against the Intervenor's-

Defendants and either (1) grant the Horton Plaintiffs' request to declare 9(f) void, or (2) in the alternative, grant the Hazell Plaintiffs' Motion for Summary Judgment.

Dated: April 27, 2007

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing:HORTON PLAINTIFFS SURREPLY MEMORANDUM SUPPORTING SUMMARY JUDGMENT FOR PLAINTIFFS 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.

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Dated: April 27, 2007

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Daniel Meek