

IN THE SUPREME COURT OF THE STATE OF OREGON

BRYN HAZELL, FRANCIS  
NELSON, TOM CIVILETTI,  
DAVID DELK, and GARY DUELL,

SC No. S059245  
SC No. S059246

Plaintiffs-Appellants Cross-  
Respondents, Petitioners on Review

CA No. A137397

and

Marion Co. Circuit Court No.  
06C22473

JOAN HORTON, and KEN LEWIS,

Plaintiffs-Appellants Cross-  
Respondents,

v.

KATE BROWN, Secretary of State of  
the State of Oregon; and JOHN R.  
KROGER, Attorney General of the  
State of Oregon,

Defendants-Respondents Cross-  
Respondents, Respondents on Review

and

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

Intervenors-Respondents Cross-  
Appellants, Respondents on Review.

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BRIEF OF *AMICUS CURIAE* ACLU FOUNDATION OF  
OREGON IN SUPPORT OF INTERVENORS

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On Review of the Decision of the Court of Appeals  
Affirming the Judgment of the Circuit Court for Marion County  
The Honorable Mary Mertens James, Judge

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Date of Court of Appeals Opinion: November 10, 2010  
Author of Opinion: Haselton, P.J.  
Concurring Judges: Armstrong and Duncan, J.J.

November 2011

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## INTRODUCTION

In *Hazell v. Brown*, 238 Or App 487, 242 P3d 743 (2010), the Court of Appeals rejected the argument of Intervenors-Cross-Appellants Center to Protect Free Speech and Fred VanNatta (“Intervenors”) that Ballot Measure 47 (2006) is void because it violates Article I, section 21, of the Oregon Constitution. In so doing, the Court of Appeals left standing the Secretary of State’s determination that “all of Measure 47 will remain dormant until such time as ‘the Oregon Constitution is found to allow, or is amended to allow,’ limitations on campaign contributions and expenditures.” *Hazell*, 238 Or App at 492 (quoting Measure 47 § 9(f)).

For the reasons Intervenors ably state in their merits brief, Amicus ACLU Foundation of Oregon, Inc. (“ACLU”) agrees that Article I, section 21, of the Oregon Constitution independently invalidates Measure 47 in its entirety.<sup>1</sup> ACLU writes separately here because the Court of Appeals’ decision – in particular, its determination that “effective” as used in Section 9(f) means “operative” – leaves Oregonians in an unacceptable state of uncertainty about when, and to what extent, Measure 47 may someday spring into life. For that reason, this Court should carefully consider the impact of its decision on the due process interests of all Oregonians if it

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<sup>1</sup> For example, among other arguments, Intervenors appropriately point out that Section 9(f) is part of Measure 47, but according to the Court of Appeals, Measure 47 is not yet operative – *except* for Section 9(f).

concludes that Article I, section 21, does not invalidate Measure 47 in its entirety.

### ARGUMENT

Federal procedural due process prevents the enactment of a statute that is so vague that people “of common intelligence must necessarily guess at its meaning and differ as to its application.” *Connally v. General Constr. Co.*, 269 US 385, 391, 46 S Ct 126, 70 L Ed 322 (1926); *see also* US Const, Amends V, XIV. A statute violates due process principles when it is “so indefinite that the line between innocent and condemned conduct becomes a matter of guesswork. This indefiniteness runs afoul of due process concepts which require that persons be given fair notice of what to avoid \* \* \*.”

Lawrence H. Tribe, *American Constitutional Law* at 1033 (2d ed 1988).

Vagueness is a particular concern when free speech principles are at stake because of the risk that the ill-defined law will cause a “chilling effect” that prevents speakers from engaging in constitutionally protected speech, even if that speech is not actually prohibited. *Grayned v. City of Rockford*, 408 US 104, 109, 92 S Ct 2294, 33 L Ed 2d 222 (1972) (“[W]here a vague statute ‘abut[s] upon sensitive areas of basic First Amendment freedoms,’ it ‘operates to inhibit the exercise of [those] freedoms.’” (first brackets added; second and third brackets in original; citations omitted)).

Section 9(f) provides that Measure 47 “shall become effective at the time that the Oregon Constitution is found to allow, or is amended to allow, such limitations [on political campaign contributions or expenditures].”

*Hazell*, 238 Or App at 492. If, as the Court of Appeals determined, “effective” means “operative,” then the result is unacceptably vague.

Virtually any constitutional amendment or constitutional decision of this Court dealing with “limitations on political campaign contributions or expenditures” – or, indeed, any salient amendments or decisions concerning Article I, section 8, of the Oregon Constitution – might potentially be deemed to “allow[] such limitations.” Thus, such amendments or decisions are likely to create uncertainty about whether Measure 47 or any of its individual provisions have suddenly become constitutional and enforceable. This is especially true because Measure 47 provides no mechanism for determining whether any of its provisions will, in fact, have been ratified. Thus, Oregonians will be left to guess whether Section 9(f) has been triggered after any related judicial decision or constitutional amendment, and they may face either substantial fines or the suppression of speech if they guess wrongly. For all of those reasons, Section 9(f) renders Measure 47 vague because it leaves open the very real possibility that persons “of common intelligence” will not know with any certainty when the law will apply or when it does apply.



This Court's precedents are consistent with those due process principles.<sup>2</sup> In fact, as the Court of Appeals noted, this Court has recognized that the people may resuscitate an unconstitutional measure by constitutional amendment, *but only if such amendment is "clearly manifested."* *People's Util. Dist. v. Wasco Co.*, 210 Or 1, 12, 305 P2d 766 (1957) (emphasis added; internal quotation marks and citation omitted).<sup>3</sup> Thus, *People's Utility District* prohibited post-hoc validation of unconstitutional legislation by mere inference or implication – the very source of the lack of clarity described above.<sup>4</sup> Measure 47, in contrast, does not limit itself to that form of direct validation. Instead, Section 9(f) purports to *expand* the methods by which voters may validate the measure, allowing validation to occur through *any* reinterpretation of the Oregon Constitution by this Court or *any* amendment of the Oregon Constitution by the people – whether or not those post-passage decisions even mention Measure 47 or any of its specific

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<sup>2</sup> Of course, even if they were not consistent, federal due process principles would trump any contrary decisions via the Supremacy Clause. US Const, Art VI, cl 2.

<sup>3</sup> The Court of Appeals attempted to distinguish *People's Utility District* on the grounds that it did not apply when a savings clause like Section 9(f) exists, 238 Or App at 500-01, but that distinction is not helpful in the due process context, where Section 9(f) itself creates substantial troubling uncertainty.

<sup>4</sup> *State v. Hecker*, 109 Or 520, 221 P 808 (1923), is not to the contrary. As the Court of Appeals noted, *Hecker* and the other similar cases it considered were resolvable upon some specific future event. *Hazell*, 238 Or App at 498-99. Thus, the due process concerns present here simply did not arise in those cases, and this Court did not address them.

provisions. By reaching too far, and trying to leave open too many possibilities for validation, the drafters of Measure 47 have only succeeded in creating hopeless uncertainty. Their decision leaves Oregonians adrift in a Bermuda Triangle in which they do not know what the law is and cannot know without costly and time-consuming litigation that is beyond the means of most.

This Court could avoid all of these due process issues by reversing the Court of Appeals' determination that "effective" means "operative." This is yet another reason – in addition to all of the other reasons that Intervenors raise in their brief – to rule in favor of Intervenors' Article I, section 21, arguments.

Dated: November 23, 2011.

*s/ P.K. Runkles-Pearson*

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Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 1,927 words.

Type Size

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Dated: November 23, 2011.

*s/ P.K. Runkles-Pearson*

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## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on November 23, 2011, I filed the foregoing BRIEF OF *AMICUS CURIAE* ACLU FOUNDATION OF OREGON IN SUPPORT OF INTERVENORS with

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