TABLE OF CONTENTS

I. INTEREST OF EACH AMICUS. 1

II. A QUESTION OF THIS IMPORTANCE AND URGENCY MILITATES STRONGLY FOR ALLOWANCE OF AMICI. 1

III. *VANNATTA*'S EVALUATION OF MEASURE 9 OF 1994 DOES NOT APPLY TO INVALIDATE THE LIMITS IN MEASURE 47. 2

A. UNLIKE MEASURE 47, MEASURE 9 OF 1994 WAS NOT SUPPORTED BY LEGISLATIVE FINDINGS OF FACT. 2

B. MEASURE 47 HAS LEGISLATIVE FINDINGS ADOPTED BY THE VOTERS OF OREGON. 3

IV. HISTORICAL PRECEDENT FOR ENFORCEMENT OF CAMPAIGN CONTRIBUTION AND EXPENDITURE LIMITATIONS IN OREGON. . . . 9

V. CONCLUSION. 10

CONTENTS OF APPENDIX

Excerpt from Measure 47 (2006), Findings . . . . . App 1

TABLE OF AUTHORITIES

CASES

Akari House, Inc. v. Irizzary, 81 Misc2d 543, 366 NYS2d 955 (1975) 5

Amwest Surety Ins. Co. v. Wilson, 11 Cal4th 1243, 1252, 48 5

Basehore v. Basehore v. Hampden Indus. Development Authority, 433 Pa 40, 248 A2d 212 (1968) 5

Benjamin v. Housing Authority of Darlington County, 15 SE2d 737 (SC 1941) 6

East New York Savings Bank v. Hahn, 293 NY 622, 59 NE2d 625 (1944) 5

FM Properties Operating Co. v. City of Austin, 93 F3d 167, 175 (5th Cir 1996) 6

Katzenbach v. McClung, 379 US 294, 85 SCt 377, 13 LEd2d 290 (1964) 4

Leary v. United States, 395 US 6, 89 SCt 1532, 23 LEd2d 57 (1969) 4, 6

Loftin v. Crowley's Inc., 150 Fla 836, 8 So 2d 909 *cert denied*, 317 US 661, 63 SCt 60, 87 LEd 531 (1942) 4

Maryland v. Wirtz, 392 US 183, 88 SCt 2017, 20 LEd2d 1020 (1968) 4

Milwaukie Co. of Jehovah's Witnesses v. Mullen, 214 Or 281, 330 P2d 5, 74 ALR2d 347 (1958), *appeal dismissed and cert denied*, 359 US 436, 79 SCt 940, 3 LEd2d 932 (1959) 4

Moore v. Thompson, 126 So2d 543 (Fla 1960) 6

Opinion of The Justices, 113 NH 201, 304 A2d 89 (NH 1973) 5

Opinion of the Justices, 88 NH 484, 190 A 425 (1937) 5

People v. Christian, 96 Misc 2d 1109, 410 NYS2d 513 (City Crim Ct 1978) 3

Savage v. Martin, 161 Or 660, 91 P2d 273 (1939) 5

Smith v. Washington County, 241 Or 380, 406 P2d 545 (1965) 5

State ex rel. Ohio Cty. Comm'n v. Samol, 165 WVa 714, 275 SE2d 2 (1980) 6

State ex rel Sullivan v. Dammann, 227 Wis 72, 277 NW 687 (1938) 4

State ex rel. Van Winkle v. Farmers Union Co-op Creamery of Sheridan, 160 Or 205, 84 P2d 471 (1938) 4

Tot v. United States, 319 US 463, 63 SCt 1241, 87 L.Ed. 1519 (1943) 4

U.S. v. Calegro De Lutro, 309 FSupp 462 (DCNY 1970) 4

United States v. Carolene Products Co., 304 US 144, 58 SCt 778, 82 LEd 1234 (1938) 4

United States v. Gainey, 380 US 63, 85 SCt 754, 13 LEd2d 658 (1965) 4, 6

Vannatta v. Keisling, 324 Or 514, 931 P2d 770 (1997) 1, 3

OTHER

James Duff Bennet, THE OPERATION OF THE INITIATIVE, REFERENDUM AND RECALL IN OREGON (MacMillan 1915) 7

Paul S. Reinsch, READINGS ON AMERICAN STATE GOVERNMENT (Ginn 1911) 7

I. INTEREST OF EACH AMICUS.

Amicus Elizabeth Trojan is an Oregon elector. She has advocated campaign finance reform legislation in Oregon for over ten years. She gathered thousands of signatures on Measures 46 and 47 (2006) and engaged in public forums and educational events about campaign finance measures. The implementation of Measure 47 is at issue in this litigation.

Fair Elections Oregon (FEO) is a registered dba of Money is Not Democracy (MIND), an active Oregon political committee which supported Measures 46 and 47 (2006). Elizabeth Trojan is an supporter of this entity and its treasurer. It is in good standing with the Elections Division of the Office of the Secretary of State. FEO has a different, particular stake in the correct implementation of laws concerning political contributes and reporting requirements for such contributions, because such laws apply to its operations.

II. A QUESTION OF THIS IMPORTANCE AND URGENCY MILITATES STRONGLY FOR ALLOWANCE OF AMICI.

One question before the Court is whether, as the State of Oregon contends, the holding of ***Vannatta v. Keisling***, 324 Or 514, 931 P2d 770 (1997), is precedential and conclusive on the meaning of Oregon Constitution, Article I, Section 8, so that any and all statutory measures which impose any contribution limits on political campaigns for Oregon offices are unconstitutional, notwithstanding Oregon Constitution, Article II, Sections 8 and 22.

ARGUMENT

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

This Court should recognize a significant distinction between Measure 47 and Measure 9 (1994), which was before the ***Vannatta*** Court. There, the Court held that Oregon Constitution, Article I, Section 8, did not allow a legislative body in Oregon to limit political campaign contributions or expenditures in the manner specifically set out in the terms of Measure 9. Measure 47 is not identical to Measure 9 of 1994--it is different in substantial ways. Here is a salient difference which (under the applicable precepts of jurisprudence) should lead to a different result: Measure 47 has extensive legislative findings of fact supporting and explaining the need for and state interest in each substantive provision of Measure 47.

A. 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 set by the measure. Although there was spirited briefing at the Circuit Court, seeking trial-like procedures at that level in order to present an evidentiary basis for the need to limit campaign contributions, the case proceeded without supplemental factual findings.

Absent legislative findings, the Court disregarded the rationales proffered by the proponents for Measure 9's limits in legal arguments and instead concluded 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.

B. MEASURE 47 HAS LEGISLATIVE FINDINGS ADOPTED BY THE VOTERS OF OREGON.

In contrast, Measure 47, in its introduction and Section (1), 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 each of the limits contained in Measure 47 and why each serves compelling state interests. These are codified at ORS Chapter 259 and are attached as an Appendix to this brief.

The existence of findings by a legislative branch of government requires a different frame of analysis.

> As a general rule it may be stated that the determination of facts required for the proper enactment of statutes is for the legislature alone, that the presumption as to the correctness of its findings is usually regarded as conclusive unless an abuse of discretion can be shown, and that the courts do not generally have jurisdiction or power to reopen the question or make new findings of fact.

AMJUR 2D, § 195 (on-line ed 2007).

Legislative findings of fact 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 the judicial role in determining the weight to give legislative findings in considering the constitutionality of an Oregon law. 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 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). 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*.

Savage v. Martin, 161 Or 660, 682, 91 P2d 273, 281 (1939), while reviewing legislative findings, held, "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." 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 Oregon view is, in fact, the majority view:

"[T]he strong presumption in zzzfavor 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).

"We must apply our analysis to the existing situation in the light of legislative findings which 'are entitled to great weight and the legislative remedy will not be stricken down unless its invalidity is clearly established.'" ***East New York Savings Bank v. Hahn***, 293 NY 622, 627, 59 NE2d 625, 626 (1944).

"'A legislative declaration of purpose is ordinarily accepted as a part of the act * * *'. ***Opinion of the Justices***, 88 NH 484, 490, 190 A 425, 429 (1937) unless incompatible with its meaning and effect." ***Opinion of The Justices***, 113 NH 201, 203, 304 A2d 89, 91 (NH 1973).

"[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).

"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).

> "[L]egislative findings to which we accord great weight because of the high regard we hold for a coordinate branch of the government are confirmed by surveys and public documents, of which this Court takes cognizance by agreement and consent of counsel." ***Benjamin v. Housing Authority of Darlington County***, 15 SE2d 737, 738 (SC 1941).

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).

During the briefing before the Circuit Court, the Defendants' Memorandum in Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' and Intervenors' Motions for Summary Judgment (March 9, 2007) [hereinafter "Defendants' Summary Judgment Memorandum"] stated (p. 12) that Measure 47's findings "express the same sort of harm that could not save Measure 9 in ***Vannatta***." This misses the point. In ***Vannatta***, 324 Or at 539, the Court stated:

> Common Cause cites numerous studies as support for its position that large campaign contributions can create undue influence over the political process. But those studies, like the arguments in favor of Measure 9 in the Voters' Pamphlet, only establish that there is a debate in society over whether and to what extent such contributions indeed cause such a harm. As ***Purcell*** and ***Stoneman*** make clear, apart from the legal question whether Article I, section 8, prohibits enactment of the law as drafted for any purpose, the 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.

The presence of extensive legislative findings of fact in Measure 47 is a fundamental difference from Measure 9 of 1994, and those findings do identify the harms.

In the absence of such findings, the ***Vannatta*** opinion felt unconstrained in making its own conclusions of fact, without citing a source of evidence.

> Shorn of its reliance on ***Fadeley***, the Secretary of State's argument is a reiteration of the idea that money necessarily and inherently corrupts candidates. It is natural that support-financial and otherwise-will respond to a candidate's positions on the issues. Yet an underlying assumption of the American electoral system always has been that, in spite of the temptations that contributions may create from time to time, those who are elected will put aside personal advantage and vote honestly and in the public interest. The political history of the nation has vindicated that assumption time and again. The periodic appearance on the political scene of knaves and blackguards cannot, so far as we know, be tied to contributions more than to other forms of expression. There is no necessary incompatibility between seeking political office and the giving and accepting of campaign contributions. This argument is not well taken.

This series of factual findings is now comprehensively contradicted by the specific findings of fact adopted by the voters of Oregon in Section (1) of Measure 47.[1] These findings are entitled to near complete judicial deference. ***State ex rel. Van Winkle***, *supra*, 160 Or at 219-220, 84 P2d at 476-77. The courts can no longer legitimately rely upon such judicial findings of fact, which were key to the invalidation of Measure 9 of 1994.

The Defendants' Reply Memorandum in Support of Motion for Summary Judgment (April 20, 2007) [hereinafter "Defendants' Reply Memorandum"] (p. 5) contends: "The shortcoming of Measure 9 in ***Vannatta*** was that the harm relied upon was insufficient, not that it was insufficiently expressed." Defendants cite nothing in ***Vannatta*** that establishes that. To the contrary, the Court specifically noted the lack of

---

1. They are further contradicted by the fact that the U.S. Congress and every state in the United States, except Oregon and New Mexico, have found it necessary and appropriate to enact and enforce limits on political campaign contributions. Federal Election Commission (FEC), CAMPAIGN FINANCE LAWS 2002, Chart 2A (http://www.fec.gov/pubrec/cfl/cfl02/cfl02chart2a.htm). We request judicial notice of these readily ascertainable facts. ORS 40.060. These facts were presented to the Circuit Court below in this case.

anything in Measure 9 to "identify a harm in the face of which Article I, Section 8, rights must give way." Such harms do indeed exist, such as potential harm to public perception of judicial integrity. ***In re Fadeley***, 310 Or 548, 802 P2d 31 (1990), for example, a case decided in the ***Robertson*** era of free speech analysis,[2] upheld a pure limitation on political speech (ban on solicitation of campaign contributions by a candidate for judicial office), because doing so served an important state interest. "[T]he interest in judicial integrity and the appearance of judicial integrity is an offsetting societal interest of that kind." *Id.*, 310 Or at 564. The important societal interests in limiting political campaign contributions and expenditures are set forth in detail in Section (1) of Measure 47. There were no such legislative findings of fact in Measure 9 of 1994.

The Defendants' Reply Memorandum (p. 6) claims that ***Vannatta*** did not make findings of fact but merely used "historical, constitutional analysis." The ***Vannatta*** analysis was dependent on statements of historical fact about the lack of need for limitations on political campaign contributions and expenditures. See ***Vannatta***, 324 Or at 541. The courts can no longer legitimately rely upon such findings, which were key to the invalidation of Measure 9 of 1994, as those findings are contradicted by the duly-enacted legislative findings of Measure 47.

---

2. ***State v. Robertson***, 293 Or 402, 649 P2d 569 (1982).

IV. HISTORICAL PRECEDENT FOR ENFORCEMENT OF CAMPAIGN CONTRIBUTION AND EXPENDITURE LIMITATIONS IN OREGON.

The voters of Oregon have enacted campaign contribution limits at least three times. Thus, the presumption granted to the legislative findings in Measure 47 should also be considered in light of the historical context which indicates voters have repeatedly sought to enact campaign finance measures.

In June 1908 Oregon voters through initiative overwhelmingly passed the Corrupt Practices Act, which the 1907 Legislature had declined to enact.[3] The 1908 Oregon Corrupt Practices Act reforms included:

1. contribution and expenditure limits upon candidates;
2. requiring candidates to report to government on their contributions and expenditures;
3. improvements to the Voters Pamphlet;
4. prohibitions on "treating" voters to favors;
5. requiring political ads to disclose who paid for them;
6. banning newspapers from accepting money to take an editorial position.

We have not located any instance in which any provision of the 1908 measure was challenged as unconstitutional, despite the fact that its terms were enforced. The cases reveal several instances of enforcement or attempted enforcement of the campaign contribution or expenditure limitations, with no defendant raising any constitutional

---

3. The vote was 54,042 yes to 31,301 no, with over 63% voting in favor, as reported by James Duff Bennet, THE OPERATION OF THE INITIATIVE, REFERENDUM AND RECALL IN OREGON (MacMillan 1915), p. 244-45; Paul S. Reinsch, READINGS ON AMERICAN STATE GOVERNMENT (Ginn 1911), p. 103.

infirmity. ***Thornton v. Johnson***, 253 Or 342, 453 P2d 178 (1969); ***Nickerson v. Mecklem et al.***, 169 Or 270, 126 P2d 1095 (1942). Others were accused of exceeding the expenditure limits. ***In re Tom McCall***, 33 Opinions Attorney General 75 (1996). Other cases show that the provisions limiting contributions and expenditures were considered valid and provided the basis for jury verdicts involving related issues. ***Printing Industry of Portland v. Banks***, 150 Or 554, 46 P2d 596 (1935). These contribution and expenditure limits were repealed by the Legislature in 1973. The voters then again enacted contribution limits in 1994 and in 2006.

V. CONCLUSION.

Measure 47 clearly and comprehensively sets out in its legislative findings the critical problem which requires legislative action. It was presented to voters. This court should acknowledge the will of the voters and their express legislative intent and rationale and distinguish its consideration of Measure 47 from the circumstances of the review presented in ***Vannatta.***

Dated: April 30, 2008

Respectfully Submitted,

James Nicita
OSB No. 024068
302 Bluff Street
Oregon City, OR 97045

Attorney for Amici Curiae