

IN THE COURT OF APPEALS OF THE STATE OF OREGON

**BRYN HAZELL, FRANCIS NELSON,
TOM CIVILETTI, DAVID DELK,
GARY DUELL, JOAN HORTON, and
KEN LEWIS,**

**Plaintiffs-Appellants
Cross-Respondents**

v.

**KATE BROWN, Secretary of State of the
State of Oregon, and
JOHN KROGER, Attorney General of the
State of Oregon,**

**Defendants-Respondents
Cross-Respondents**

and

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

**Intervenors-Respondents
Cross-Appellants**

No. A137397

**Marion County Circuit Court
Case No. 06C-22473**

**REPLY BRIEF OF
HAZELL
PLAINTIFFS**

Appeal from the Judgment of
the Circuit Court of Marion
County

Honorable
Mary Mertens James, Judge

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TABLE OF CONTENTS

- I. STATEMENT OF THE CASE. 1
- II. FIRST ASSIGNMENT OF ERROR: THE COURT ERRED IN GRANTING DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT BASED ON SECTION (9)(F) OF MEASURE 47 (declaratory relief). 1
 - 1. GOVERNMENT OFFICERS ARE REQUIRED TO IMPLEMENT AND ENFORCE DULY-ENACTED STATUTES. 4
 - 2. THE CIRCUIT COURT ERRED IN FAILING TO ADDRESS THE CONSTITUTIONALITY OF THE SPECIFIC LIMITATIONS OF MEASURE 47. 4
 - 3. THERE IS NO REMOTELY COGNIZABLE CHALLENGE TO LEAST 12 SEVERABLE AND INDEPENDENTLY ENFORCEABLE PROVISIONS OF MEASURE 47. 8
 - 4. REGARDING ALL OF MEASURE 47, IMPLEMENTATION IS NOT EXCUSED BY SECTION (9)(f). 8
 - a. THE PREDICATE FOR TRIGGERING (9)(f) HAS NOT OCCURRED. 9
 - (1) SECTION (9)(F) DOES NOT CALL FOR A GENERIC DETERMINATION ABOUT THE CONSTITUTIONALITY OF UNKNOWN HYPOTHETICAL LIMITS. 9
 - (2) THERE IS NO LEGAL BASIS FOR SUCH A GENERIC DETERMINATION. 13
 - (3) ANY SUCH GENERIC DETERMINATION WOULD HAVE TO CONSIDER NON-NUMERIC LIMITATIONS.** 15
 - (4) DEFENDANTS CLAIM THAT THE CIRCUIT COURT MADE NO CONCLUSIONS ABOUT THE CONSTITUTIONALITY OF THE LIMITATIONS CONTAINED IN MEASURE 47. 15
 - (5) SECTION (9)(F) IS NOT REDUNDANT WITH THE SECTION (11) SEVERABILITY CLAUSE. 15

b. EVEN IF THE PREDICATE FOR TRIGGERING (9)(f) HAS OCCURRED, SOME PARTY PROVE THE UNCONSTITUTIONALITY OF THE SPECIFIC PROVISIONS OF MEASURE 47. 15

III. SECOND ASSIGNMENT OF ERROR: THE COURT ERRED IN DENYING HAZELL PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT ON THEIR FIRST CLAIM FOR RELIEF (Declaratory Relief). 16

IV. THIRD ASSIGNMENT OF ERROR: THE COURT ERRED IN DENYING HAZELL PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT ON THEIR SECOND CLAIM FOR RELIEF 16

TABLE OF AUTHORITIES

CASES

Armatta v. Kitzhaber, 327 Or 250, 959 P2d 49 (1998) 14

Brown v. Oregon State Bar, 293 Or 446, 648 P2d 1289 (1982) 13

Leupold & Stevens, Inc. v. City of Beaverton, 226 Or App 374, 203 P3d 309, 312 (2009) 7

McBeth v. Elliot, 42 Or App 783, 401 P2d 871 (1979) 7

Meyer v. Bradbury, 341 Or 288, 142 P3d 1031 (2006) 3, 13

Milwaukie Co. of Jehovah’s Witnesses v. Mullen et al, 1958, 214 Or. 281, 330 P2d 5 *appeal dismissed*, 359 US 436, 79 SCt 940, 3 LEd2d 932 4

Oregon-Nevada-California Fast Freight, Inc. v. Stewart, 223 Or 314, 353 P2d 541 (1960) 4

Vannatta v. Keisling, 324 Or 514, 931 P2d 770 (1997) 2, 3, 13

OREGON CONSTITUTION

Article I, § 8 5

STATUTES

ORS 40.060 10

The Hazell Plaintiffs file this Reply Brief. They also join and/or adopt the Combined Reply and Cross-Answering Brief of the Horton Plaintiffs, filed this date, with consent of the Horton Plaintiffs, except they do not join or adopt arguments previously made by the Horton Plaintiffs that § (9)(f) is infirm under the Oregon Constitution.

I. STATEMENT OF THE CASE.

The Respondents/Cross Respondents' Brief filed by the Attorney General [hereinafter "State's Brief" or "Defendants"] offers four restated questions presented. These are incomplete and do not address all of the issues in this case. The questions presented by the Horton Plaintiffs and the Hazell Plaintiffs in their opening briefs properly define the issues.

II. FIRST ASSIGNMENT OF ERROR: THE COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BASED ON SECTION (9)(F) OF MEASURE 47 (declaratory relief).

First, the State's Brief entirely fails to defend the trial court's severing of 5 words from § (9)(f) ("is found to allow, or,"). Horton ER 47.

According to the State, Measure 47 is "suspended," until and unless limits on political campaign contributions or expenditures (in general, not the specific Measure 47 limits) are found constitutionally valid (presumably by the Oregon Supreme Court). Yet, says the State, the courts cannot reach the issue of the constitutional validity of the limits in Measure 47, because it is suspended. Thus, implementation of Measure 47 must wait until some other case comes along in which the Oregon Supreme Court decides that limits on political campaign contributions and expenditures (in general) are constitutional (even though it is not the function of the courts to make such general pronouncements but instead to examine the specific statutes at issue).

The State's argument misconceives the function of the courts and is entirely circular. The State's argument is, in essence, that § (9)(f) is a black hole that absorbs and destroys all of Measure 47, except § (9)(f) itself. This is illogical; see Hazell Opening Brief, pp. 9-13; Opening Brief of Cross-Appellants Center to Protect Free Speech and Fred Vannatta, pp. 20-21.

The function of § (9)(f), along with the severability clause § (11), is to ensure that the limitations in Measure 47 shall not merely be discarded, should Measure 46 not also pass, but shall go into effect once the constitutionality of each provision in Measure 47 has been determined. That requires that the courts indeed consider the constitutional validity of the specific limitations in Measure 47 in order to determine whether each shall be operative. Plaintiffs have sought a declaration that the provisions of Measure 47 are valid, and that is contested by the State, which contends that all its substantive limitations transgress *Vannatta v. Keisling*, 324 Or 514, 931 P2d 770 (1997). Thus, under the only logical application of § 9(f), by the conclusion of this litigation, each provision of Measure 47 will have been evaluated, and the constitutionally validated portions of Measure 47 must be considered effective and operative, while any sections in conflict with the Court's interpretation of the Oregon Constitution will be suspended.

The State's position also contradicts the principle that note that every part of a statute has meaning. According to the State, no words of Measure 47 have meaning, as the end result is the same as if Measure 47 were never enacted. Says the State, no part of Measure 47 is actually in effect, and no one has standing to obtain review of the constitutionality of Measure 47's limits on limits on political campaign contributions and expenditures, because:

1. Section (9)(f) places the entire statute into suspension, because of some sort of general feeling that campaign finance limitations are unconstitutional, without any examination of the specific limitations in Measure 47 or the newly available historical evidence about

campaign contribution limitations prior to 1859.

2. Because the entire statute is suspended and is therefore not being implemented (except somehow § (9)(f) itself), there is no justiciable controversy about the constitutionality of any of the specific provisions of Measure 47. Consequently, the constitutionality of the substantive limitations in Measure 47 cannot be adjudicated, so the phrase "or is found to allow" in § (9)(f) is a nullity.

The end result of the State's theory is the same as if the Oregon electorate never passed Measure 47 at all.

Defendants (and the Intervenors-Respondents Cross-Appellants [hereinafter "Intervenors"]) did not claim that any particular substantive section of Measure 47 was in conflict with the Oregon Constitution. The Circuit Court did not engage in any review of any substantive section but ruled that:

- (1) campaign contribution and expenditure limits, generically, are contrary to the teachings *Vannatta*, *supra*, and *Meyer v. Bradbury*, 341 Or 288, 142 P3d 1031 (2006);¹ and
- (2) this generic conclusion somehow places all of Measure 47 into limbo.

The Circuit Court did not conclude that any substantive limit in Measure 47 is unconstitutional.

The Horton Plaintiffs and the Intervenors argued that § (9)(f) is itself not valid under the Oregon Constitution, for different reasons. If any part of § (9)(f) is invalid, however, then § (11) of Measure 47 requires severance of all of § (9)(f) from the remainder of Measure 47. Defendants have now affirmatively agreed that, if § (9)(f) is invalid, it must be severed in its entirety and therefore leave the

1. In *Meyer v. Bradbury*, 341 Or 288, 142 P3d 1031 (2006), the validity of laws restricting contributions or expenditures was not at issue. Instead, there intervenor-defendant David Delk (here one of the Hazell Plaintiffs) prevailed against a lawsuit brought by employees of the Oregon Chapter of American Civil Liberties Union to remove Measure 46 (not Measure 47) from the ballot for constituting more than one amendment to the Oregon Constitution. The Oregon Supreme Court was commenting upon its decision in *Vannatta*, 324 Or 514, 931 P2d 770 (1997). The comments were *dicta*.

remainder of Measure 47 intact and having "immediate operative effect." State's Brief, p. 50 (similar statement at State's Brief, p. 5).

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

Neither Defendants nor Intervenors contest this. Nor do they contest that 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 US 436, 79 SCt 940, 3 LEd2d 932.

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

Defendants are obligated to implement and enforce all parts of Measure 47, unless and until those parts are ruled unconstitutional by the courts. Defendants, in denying direct Oregon Supreme Court jurisdiction in this case, asserted that no court has made such a finding of unconstitutionality, yet they refuse to implement Measure 47. See Opening Brief of Horton Plaintiffs, p. 15, n8.

2. THE CIRCUIT COURT ERRED IN FAILING TO ADDRESS THE CONSTITUTIONALITY OF THE SPECIFIC LIMITATIONS OF MEASURE 47.

In full, § (9)(f) of Measure 47 states:

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.

As pointed out in the Hazell Opening Brief (pp. 11-12) and not refuted in the State's Brief, Defendants already admitted that the "limitations on political campaign contributions or expenditures" referred to in § (9)(f) are the numeric limitations

contained within Measure 47 itself and not some other hypothetical limitations or the generic concept of limitations.² Thus, the question posed by § (9)(f) is whether the "limitations on political campaign contributions or expenditures" contained in Measure 47 are allowed by the Oregon Constitution. In this litigation, the Plaintiffs have asserted and shown that each of those limitations is valid, while the State has denied their validity (State's Brief, pp. 38-44). It is thus the function of this Court to decide the constitutionality of those limitations in order to determine which of the provisions of Measure 47 are effective.³

As noted in the Hazell Opening Brief, the Circuit Court erred by failing to consider the constitutionality of the specific provisions of Measure 47. Instead, the court misinterpreted § (9)(f) as calling for some sort of determination about the constitutionality in Oregon of unspecified hypothetical or generic limits on political campaign contributions and expenditures. According to the Circuit Court, the constitutionality of the specific provisions of Measure 47 under the existing Oregon Constitution can never be decided by the courts, as the Circuit Court's decision struck the 5 words "is found to allow, or" from § (9)(f). Horton ER 47.

Curiously, and for the first time asserted by Defendants, the State's Brief (pp. 36-37, 50) also now contends that the constitutionality of the specific provisions of Measure 47 can never be decided by the courts, arguing:

Because the entire measure is suspended and unenforceable, the question of the constitutionality of its individual provisions and, by extension, the

2. [State's] Memorandum in Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' and Intervenors' Motions for Summary Judgment (March 9, 2007) [OJIN No. 28], p. 14 [Hazell ER 4], stated:

The measure's organization also confirms that "limitations on campaign contributions and expenditures" [in § (9)(f)] refers to the Act's numeric limits on CC&E amounts.

3. In this discussion, "constitutionality" means validity in light of Article I, § 8, of the Oregon Constitution.

severability of individual provisions is not ripe for review. Any ruling by the trial court would be merely advisory and, therefore, the trial court correctly chose not to address those issues.

* * *

Because the measure is suspended, it is unenforceable. Accordingly, the trial court did not err when it denied the Hazell Plaintiffs' motion for summary judgment on their claim for injunctive relief.

The State's argument is a shaky edifice. It adopts the trial court's fallacies:

- (1) Without looking at the substantive terms of Measure 47 and attempting judicial review of those provisions--but through some sort of generally received wisdom--the actual CC&E portions of Measure 47 are deemed currently prohibited by the Oregon Constitution;
- (2) Based on this conclusion of law based on some general principles, therefore § 9(f) itself stops any actual judicial review of the substantive terms of Measure 47, since § 9(f) makes the Act "suspended and unenforceable";
- (3) § 9(f) is indeed part of "this Act," yet it is not suspended and unenforceable but instead is given operative effect, while the rest of the Act is codified but not in effect and not reviewable.

Further, the State raises the new argument that Plaintiffs have no right to any judicial decision about the constitutionality of any of the substantive provisions in Measure 47 (and no right to the injunctive relief of compelling Defendants to implement the valid portions of Measure 47), because § (9)(f) places all of Measure 47's substantive provisions into suspension. Thus, the State now argues that the constitutionality of Measure 47's substantive provisions is not justiciable. And, under this new theory, there is nothing that would cause the constitutionality of those provisions ever to become justiciable, so Measure 47 is placed into permanent limbo without judicial review of the constitutionality of any of its substantive provisions under the terms of the existing Oregon Constitution.

The State has challenged the justiciability of the issues raised by Intervenors on grounds that Intervenors lacked standing because Measure 47 was not being enforced against them (similar to the State's new argument, pp. 36-37, that the

substantive provisions of Measure 47 cannot be reviewed because they are not being enforced.) The trial court rejected the State's argument against Intervenors.

Further, the two cases about lack of enforcement cited by the State (p. 37) conclude that, under some circumstances, the validity of a statute cannot be challenged by someone who is theoretically subject to the statute, if the statute is not being enforced or likely to be enforced against that person. That is akin to the position of the Intervenors in this case. But it is the opposite of the position of the Plaintiffs. Unlike the Intervenors, Plaintiffs do not seek to avoid enforcement of a statute, because it is invalid. Plaintiffs seek to compel enforcement of a statute. The fact that the statute is not being enforced is what makes this a justiciable controversy in the first place. Plaintiffs seek a declaration of enforceability of the Measure 47 which Defendants deny. See, generally, *Leupold & Stevens, Inc. v. City of Beaverton*, 226 Or App 374,380, 203 P3d 309, 312 (2009) (court has subject matter jurisdiction for declaratory judgment when City refused to even consider applicability of new law). Courts have jurisdiction to consider official inaction, unless the Legislature has provided another exclusive remedy. *Leupold*, 226 Or at 377; *McBeth v. Elliot*, 42 Or App 783, 786, 401 P2d 871, 873 (1979). The State's argument is circular: Plaintiffs cannot obtain review of a statute, in order to secure its application, because the State is not enforcing it. Under that rationale, no one could ever obtain judicial review of any decision by the State not to enforce a statute.

The error in failing to address the constitutionality of Measure 47's specific provisions is further discussed in part III.E.5 of this brief.

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

The State's only argument (pp. 36-37) about Measure 47 severability clause, § (11), is that it too is placed in suspension by § (9)(f).

The Hazell Opening Brief (pp. 14-16) discussed the 12 independently enforceable provisions in Measure 47 that do not establish numeric limits on campaign contributions or expenditures. The State's Brief (1) does not deny that none of these 12 provisions establishes a numeric limit and (2) does not contend that any of these 12 sections is in any way unconstitutional. Thus, the State has no legal basis for refusing to implement and enforce these 12 provisions.

4. REGARDING ALL OF MEASURE 47, IMPLEMENTATION IS NOT EXCUSED BY SECTION (9)(f).

The State's Brief fails to recognize the difference between these quo issues:

- (1) whether § (9)(f) has triggered; and
- (2) the consequence of § (9)(f) triggering.

As explained by the Hazell Opening Brief (p. 27), the consequence of § (9)(f) triggering is merely the conduct of litigation on the constitutionality of Measure 47's substantive limitations. Defendants have not contradicted this.

Thus, Plaintiffs could concede that § (9)(f) has been triggered, which would mean that the limitations in Measure 47 are not in effect until their constitutionality has been determined, including discretionary review by the Oregon Supreme Court. In this very litigation, Plaintiffs have contended and shown that the Measure 47 limitations are constitutional, while Defendants have denied that. The issues regarding the constitutionality of those limitations have been briefed.

So, even if § (9)(f) is considered to have triggered, it is now incumbent upon the Court to determine the substantive constitutionality of Measure 47's limitations,

which requires examining each provision to determine its validity. And proceeding to those determinations would allow the Court to bypass the entire discussion of whether § (9)(f) has or has not triggered.

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

(1) SECTION (9)(F) DOES NOT CALL FOR A GENERIC DETERMINATION ABOUT THE CONSTITUTIONALITY OF UNKNOWN HYPOTHETICAL LIMITS.

The discussion in the State's Brief (pp. 31-37) of § (9)(f) is unfounded and internally inconsistent. First, it fails to defend or even mention the trial court's severing of 5 words from § (9)(f) ("is found to allow, or"), which was crucial to the trial court's decision.

Second, the State's Brief (p. 32) states this about the context of § (9)(f):

That context, in turn, makes clear that at the time the measure was presented, the voters understood that the measure's CC&E limits were barred by the constitution as interpreted by the court in *VanNatta* and their enforceability was contingent on a change either to the constitution or to the Oregon or to the Oregon Supreme Court's interpretation of it.⁴

Initially, the context cited by the State does not support that conclusion. Nothing in Measure 47 cited by the State states such a conclusion. The findings in Section (1)(r) refer to contribution limits "similar to those in this Act," not that the limits are identical nor that the Measure 47 limits would suffer the same constitutional infirmities as the Measure 9 (1994) limits.⁵

While everyone would agree that enactment of Measure 46 would have precluded arguments about the state constitutionality of Measure 47's limitations on

4. The State's Brief (p. 3) makes a similar unfounded statement about what "proponents of the two measures understood."

5. Ironically, a major difference between Measure 9 of 1994 and Measure 47 is the existence of Section (1)(r) itself, the extensive legislative findings, as shown in the Hazell Opening Brief, pp. 28-29 (incorporating the discussion in the Amicus Brief of Elizabeth Trojan and Fair Elections Oregon).

political campaign contributions and expenditures, what voters might have thought about the constitutionality of Measure 47's limitations is not material to any argument here. If voters had thought that Measure 47's limitations were constitutionally valid, would that make them constitutionally valid? Of course not. Thus, the mere (alleged and unproven) assertion that voters thought that Measure 47's limitations were not valid, even if that belief existed, does not make them invalid. That is a legal determination for the courts, not a matter of voter intent.⁶

Further, the State's contentions about voter intent are far-fetched. Easily over 99% of the content of the Voters' Pamphlet on Measure 47 concerns the need for limits on political campaign contributions and expenditures and how Measure 47 specifically addresses that need. There is zero discussion about all of Measure 47 being placed into suspension (except § (9)(f) itself).⁷

In addition, even if we assume that the State's incorrect assertion about the context were correct, that would only support the position of the Plaintiffs--that Measure 47's limits would be enforceable, contingent upon the Oregon Supreme Court's interpretation of the Constitution applied to Measure 47's limitations. It is that determination about the constitutionality of Measure 47 that Plaintiffs seek in this litigation (and which the State seeks to prevent the courts from making).

In other words, section 1(r) and section (9)(f) of Measure 47, read together, assume that a change to the constitution, or a decision by the Oregon Supreme Court overruling its prior holdings, would be necessary before the CC&E limits contained in the measure would be permissible.

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6. As for the ballot title on Measure 46, the proposed constitutional amendment, that language was written by one of the Defendants, the Attorney General, in a proceeding (ballot title preparation and challenge) in which the substantive constitutionality of Measure 47 could not be, and was not, argued. Ballot titles are not Oregon Supreme Court opinions and are necessarily very truncated.
 7. Secretary of State, Online Voters' Pamphlet for November 7, 2006, General Election (<http://www.sos.state.or.us/elections/nov72006/guide/meas/m47.html>). If necessary, we request judicial notice regarding this content. ORS 40.060.

State's Brief, p. 33. That is partly right. The Oregon Supreme Court's decision would be one pertaining to the constitutionality of Measure 47's provisions, which may nor may not require "overruling its prior holdings," as:

- (1) there has been no holding that any of the specific limitations in Measure 47 is invalid, and
- (2) we have presented several arguments supporting the validity of the Measure 47 limits, even in the absence of overruling *Vannatta* or any other prior decision. Hazell Opening Brief, pp. 28-49.

The conclusion of all this discussion of context in the State's Brief then contradicts the express language of § (9)(f).

Accordingly, the text and context of Measure 47 make clear that the voters understood and intended that a constitutional change like that proposed by Measure 46 would be necessary to authorize Measure 47's CC&E limits.

State's Brief, p. 34. But § (9)(f) expressly contradicts that conclusion by stating that the limitations "shall become effective at the time that the Oregon Constitution is found to allow, or is amended to allow, such limitations." The interpretation from context urged by the State's Brief, requiring "a constitutional change like that proposed by Measure 46," would negate and nullify the words "is found to allow" from § (9)(f), which clearly contemplated that the Measure 47 limitations might pass constitutional muster without any amendment.⁸

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8. The State's references (p. 35) to Measure 47's Section (1)(a) then contradicts the State's argument:

Similarly, section (1)(a) of the measure provides that "prohibitions, limits, and reporting and disclosure requirements" are necessary to curb undue influence. (Horton ER 11). That text of section (1)(a), like that of the preamble, makes clear that Measure 47 distinguishes reporting and disclosure requirements from CC&E limits.

It also, then, makes clear that Measure 47 distinguishes between "prohibitions" and "limits." If "prohibitions" and "limits" are different things (as § (1)(a) states), that takes all of Measure 47's "prohibitions" entirely out of the State's rationale regarding "limits." Those prohibitions include the prohibition of contributions and prohibition of independent expenditures by any corporation or union.

(continued...)

Thus, the condition precedent for triggering § (9)(f) has not occurred, and the "suspension" period claimed by Defendants is not in effect. The correct condition precedent for triggering § (9)(f) would be a judicial determination that the limitations on CC&E contained in Measure 47 are unconstitutional. Such has not occurred; the Circuit Court declined to address this issue.

The State's Brief (p. 36) then argues that § (9)(f) does not allow Measure 47's severability clause to function, because "Section (9)(f) does not carve out exceptions to its application." The State states:

Not "those parts of this Act that are unconstitutional," but "this Act." Thus, it is clear from the text and context of Measure 47, generally, and section (9)(f), specifically, that *all* of Measure 47 would be placed in suspension so long as the Oregon Constitution barred CC&E limitations.

But that argument is entirely circular. If § (9)(f) suspends the entire Act pending future court decision or constitutional amendment, then it also suspends itself, because § (9)(f) is part of the Act. Courts are not to construe duly-enacted statutes to be self-immolating nullities, which is what the State insists for Measure 47. This logical conundrum is avoided by correctly interpreting § (9)(f) to require judicial examination of each limitation contained in Measure 47 for constitutionality, with those surviving review becoming operative.

(2) THERE IS NO LEGAL BASIS FOR SUCH A GENERIC DETERMINATION.

The Circuit Court made this sweeping generalized determination (Letter Opinion, Horton ER 43):

First, as a matter of law, I find that at the time of Measure 47's passage in 2006, the Oregon Constitution precluded any limitations on CC&Es.

There was no basis for the Circuit Court to make this overbroad (and unnecessary)

8.(...continued)

Measure 47, §§ (3)(a), (6)(a). This illustrates the weakness of trying to use "context" to contradict the clear text of § (9)(f).

determination, which is an advisory opinion regarding any and all hypothetical CC&Es. Advisory opining about hypothetical statutes is not a judicial function in Oregon. *Brown v. Oregon State Bar*, 293 Or 446, 449, 648 P2d 1289 (1982).

In defending this sweeping determination, the State's Brief misstates the applicable case law and misconceives the function of case law in this statement:

The Oregon Supreme Court has held--definitively and categorically--that statutory limits on CC&Es are impermissible under the Oregon Constitution. *Meyer*, 341 Or at 299 ("legislatively imposed limitations on individual political campaign contributions and expenditures [are] impermissible."); *VanNatta*, 324 Or at 541 (because political campaign contribution limitations restrict expression, they are unconstitutional under Article I, § 8).

State's Brief, p. 31. Note first that the State misconceives the function of case law and judicial opinions. Opinions decide the cases that are presented. When the constitutionality of a statute is challenged, the opinion must examine that statute. Of course, judicial decisions are precedential, but the party asserting (and having the burden of proving) the unconstitutionality of a statute must show how the prior decisions are applicable to the statute at issue. Here, the State contends that the constitutionality of the specific provisions of Measure 47 cannot even be addressed.

Note second that even the quotation the State extracts from *Meyer v. Bradbury* (which presumably is the best quotation available for the State) disproves the State's contention: "legislatively imposed limitations on individual political campaign contributions and expenditures [are] impermissible." Measure 47 in separate, severable sections contains limits on the political campaign contributions and expenditures of non-individuals--corporations and unions--and the Hazell Plaintiffs have shown how those limits are both valid and severable. Hazell Opening Brief, pp. 29-30. This illustrates the need for the Court to examine the specific provisions of the statute at issue and not to rely on sweeping generalities derived from past

cases dealing with different statutes.⁹

The State's Brief (p. 32) then reverses course and claims that the phrase "limitations on political campaign contributions or expenditures" in § (9)(f) does not refer to any limitations within Measure 47 itself but instead refers to some sort of hypothetical or generic limitations.

As explained below, a separate ruling on the CC&E limits in Measure 47 is not contemplated by the measure, nor is such a ruling necessary to trigger section (9)(f).

Then the State (p. 33) appears to re-reverse, quoting this sentence from Measure 47's Section (1)(r) as providing context for the meaning of § (9)(f):

This Act shall take effect at a time when the Oregon Constitution does allow the limitations contained in this Act.

If that is what § (9)(f) means, then the Court must apply the Oregon Constitution to the Measure 47 limitations to determine whether it "allow[s] the limitations contained in this Act," not some other hypothetical or generic concept of political campaign finance limitations.

NOTE: The State's Brief's offers no response to the arguments in parts III.E.5.a.(3)

- (5) of the Hazell Opening Brief, which remain valid:

(3) ANY SUCH GENERIC DETERMINATION WOULD HAVE TO CONSIDER NON-NUMERIC LIMITATIONS.

(4) DEFENDANTS CLAIM THAT THE CIRCUIT COURT MADE NO CONCLUSIONS ABOUT THE CONSTITUTIONALITY OF THE LIMITATIONS CONTAINED IN MEASURE 47.

9. And, as noted in the Hazell Opening Brief (p. 6 n3), the quotation from *Meyer* was *dicta*. *Meyer* was "separate amendment" challenge to Measure 46, such as *Armatta v. Kitzhaber*, 327 Or 250, 959 P2d 49 (1998), and its progeny. No party there needed to argue that the *Vannatta* analysis did or did not apply to Measure 47; it was not an issue. Perhaps the State was unable to extract a sufficiently vague quotation from *Vannatta* and so offers its own paraphrased generalization instead.

(5) SECTION (9)(F) IS NOT REDUNDANT WITH THE SECTION (11) SEVERABILITY CLAUSE.

b. EVEN IF THE PREDICATE FOR TRIGGERING (9)(f) HAS OCCURRED, SOME PARTY PROVE THE UNCONSTITUTIONALITY OF THE SPECIFIC PROVISIONS OF MEASURE 47.

Even if § (9)(f) has been "triggered," the consequence is merely that the limitations in Measure 47 are suspended, pending the outcome of litigation to determine their validity. This is that litigation, as the Circuit Court itself recognized. See this section of the Hazell Opening Brief and the discussion at page 8 of this brief, *supra*.

III. SECOND ASSIGNMENT OF ERROR: THE COURT ERRED IN DENYING HAZELL PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON THEIR FIRST CLAIM FOR RELIEF (Declaratory Relief).

Here, the Hazell Plaintiffs join and/or adopt the response to the State's Brief presented in Combined Reply and Cross-Answering Brief of the Horton Plaintiffs.

IV. THIRD ASSIGNMENT OF ERROR.

The State's Brief (p. 50) offers no response, except to repeat its position on § (9)(f).

Dated: April 13, 2009

Respectfully Submitted,

/s/ Daniel W. Meek

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I FILED the original and SERVED the foregoing **REPLY BRIEF OF THE HAZELL PLAINTIFFS** by eFile this date.

Dated: April 13, 2009

/s/ Daniel W. Meek

Daniel W. Meek