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.

BILL BRADBURY, Secretary of State of the State of Oregon, HARDY MYERS, 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

OPENING BRIEF OF HAZELL PLAINTIFFS

AND

EXCERPTS OF RECORD AND APPENDIX

Appeal from the Judgment of the Circuit Court
for Marion County

Honorable Mary Mertens James, Judge

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Plaintiffs Hazell, Nelson, Civiletti, Delk, and Duell [hereinafter "Hazell" or "Hazell Plaintiffs"] seek reversal of the decision of the Circuit Court and an order requiring Defendants to implement all of Measure 47 (2006) or all parts that are not unconstitutional.

I. STATEMENT OF THE CASE.

The Hazell Plaintiffs adopt the Statement of the Case presented in the *Opening Brief of the Horton Plaintiffs*, filed May 14, 2008, except as noted below.

A. QUESTIONS PRESENTED.

1. Does Section (9)(f) of Measure 47 place the entire measure into suspension?

2. Does Section (9)(f)'s reference to "limitations on political campaign contributions or expenditures" refer to those limitations contained in Measure 47 itself or to some generic, unknown future limitations that might come to the attention of the courts?

3. Does Section (9)(f) excuse Defendants from implementing and enforcing any of Measure 47?

4. Does Measure 47 contain 12 severable and independently enforceable provisions, apart from its numeric limitations on political campaign contributions?

5. Which of Measure 47's limitations, if any, are invalid under the analysis employed in ***Vannatta v. Keisling***, 324 Or 514, 931 P2d 770 (1997) (hereinafter "***Vannatta***")?

6. Should some aspects of ***Vannatta*** be reconsidered?

B. SUMMARY OF ARGUMENT.

Defendants are unlawfully refusing to implement and enforce Measure 47 (2006), a statute duly enacted by the people of Oregon. They claim that the

operation of Measure 47 is somehow fully "suspended" by its own § (9)(f), despite the illogic of that assertion and despite the fact that § (9)(f) simply calls for preservation of all of Measure 47, pending judicial evaluation of the substantive limitations in Measure 47 on political campaign contributions and expenditures.

No party has challenged the constitutionality of those substantive limitations, which in any event are valid under a complete reading of a correct history of the Oregon Constitution and under the rationales of ***Vannatta*** itself. If necessary, ***Vannatta*** should be reconsidered.

II. FACTS.

The Hazell Plaintiffs adopt the statement of facts presented in the Opening Brief of the Horton Plaintiffs, supplemented at § III.D, below.

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

A. RULING OF THE TRIAL COURT.

The Circuit Court issued a Letter Opinion on September 25, 2007, denying summary judgment for the Hazell Plaintiffs and granting summary judgment for Defendants. Horton ER 41-47.

B. PRESERVATION OF ERROR.

Hazell Plaintiffs preserved error by (1) filing detailed legal memoranda in support of their position and in response and reply to the specific arguments raised

by other parties [OJIN Nos. 23, 30, 37] and (2) orally arguing in support of these positions at the July 13, 2007, hearing [OJIN No. 68].

C. STANDARD OF REVIEW UPON APPEAL.

There are no material facts in dispute. The court reviews for error of law. The standard for granting or denying summary judgment is set forth in ***Jones v. GMC***, 325 Or 404, 413, 939 P2d 608 (1997). The proponent of summary judgment must show that "no objectively reasonable" trier of fact could return a verdict" for the opponent of summary judgment. ***Jones***, 325 Or at 425.

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, Daniel Meek, and Linda Williams [OJIN Nos. 24, 25, 32]; and other facts which may be appropriate for judicial notice.

At the November 7, 2006, general election, the voters of Oregon enacted Measure 47. 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 codified 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 of State, 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 § (9)(f) (Complaint,

Exhibit B, Horton ER 1). The Attorney General then notified legal representatives of the Chief Petitioners that he refuses to implement any part of Measure 47 other than § (9)(f) and will take no action to obtain judicial interpretation of Measure 47.

E. DISCUSSION.

The Hazell Plaintiffs sought declarations that:

1. Each Defendant is obligated to administer and enforce each and all of the provisions of Measure 47, except those provisions specifically found to be unconstitutional by the courts.

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

2. Section (9)(f) does not authorize Defendants to avoid litigation to determine which provisions of Measure 47 are or are not unconstitutional.

By refusing to implement any part of Measure 47, other than an incorrect interpretation of § (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 interpretation of § (9)(f), the Attorney General is in violation of his duty, as the 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. Defendants are obligated to implement and enforce all parts of Measure 47, unless and until those parts are ruled unconstitutional by the courts. Defendants assert no court has made such a finding of unconstitutionality, yet they refuse to implement Measure 47. Earlier this year in the record of this case on appeal, Defendants argued to the Oregon Supreme Court upon briefing about original Supreme Court jurisdiction under ORS 250.044(5), that no court has found any part of Measure 47 to be unconstitutional.[1]

Defendants' rationale for not implementing the substantive provisions of Measure 47 is that its § (9)(f) places the measure into a state of suspension, which automatically lifts only upon (1) a ruling that limits on political campaign contributions or expenditures are constitutional in some unknown future case involving some other law, or (2) an amendment to the Oregon Constitution authorizing limits on political campaign contributions or expenditures. Letter Opinion, Horton ER 43-44; Tr. 61-62; Horton ER 37-38. Hazell Plaintiffs contended, *inter alia*, that § 9(f) requires ruling upon the Measure 47 provisions in the instant litigation as both necessary and prior to any suspension of its operation.[2]

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1. Defendants' argument is set out at Opening Brief of Horton Plaintiffs, p. 15, n8.

2. The Circuit Court's approach is illustrated in the transcript of the hearing on July 13, 2007 [hereinafter "Tr."], Tr. 61-62 (emphasis added):

> THE COURT: Doesn't it say that it shall be litigated? Because it doesn't really say that -- it doesn't really say that it shall be litigated, it says that it

(continued...)

Even though Defendants sought no ruling that any part of Measure 47 is unconstitutional, the Circuit Court ruled that (1) campaign contribution and expenditure limits, generically, are contrary to the teachings of ***Vannatta***, *supra*, and ***Meyer v. Bradbury***, 341 Or 288, 142 P3d 1031 (2006),[3] 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.

2.(...continued)

> shall be codified and become effective at the time that the Oregon constitution is found to allow, or is amended to allow, such limitations.
>
> **MR. MEEK: And without litigation, how would there be a finding that the Oregon constitution allows the limitations?**
>
> **THE COURT: Well, it may not be litigation on this particular case. It may be litigation on another case involving other limitations.**
>
> MR. MEEK: So litigation on some other matter that we don't know about is what would determine whether the provisions, the specific provisions of Measure 47 are constitutional? I don't find that to be a rational approach. The rational approach is Section 9(f) calls for findings that the Oregon constitution does or does not allow the limitations in Measure 47. The limitations in Measure 47 should not depend on their validity upon findings about something else, about some other limitations.

But the Circuit Court then removed entirely the opportunity for lifting the suspension through future litigation by striking from § (9)(f) the 5 words "is found to allow, or" in its Letter Opinion, Horton ER 47.

3. 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*. No party in ***Meyer v. Bradbury*** argued that the ***Vannatta*** analysis did or did not apply to Measure 47. It was not an issue.

As noted in footnote 2, above, the Circuit Court then eliminated any opportunity for lifting the suspension by the first method (judicial findings) by incorrectly severing the 5 words that call for such judicial findings ("is found to allow, or,") from § (9)(f) in a manner contrary to Measure 47's own severability clause (§ 11), contrary to ORS 174.040, and contrary to Oregon's common law regarding severability. Section (11) does not allow the severance of a string of words that does not constitute a "section, subsection, or subdivision thereof" of Measure 47. See Opening Brief of Horton Plaintiffs, pp. 14-17, which we adopt and incorporate herein. The trial court did not indicate how the statutory suspension can ever be terminated (apart from a future constitutional amendment), so that the courts decide on the constitutionality of Measure 47's CC&E limits.[4]

The Horton Plaintiffs and the Intervenors-Respondents Cross-Appellants [hereinafter "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. See Opening Brief of the Horton Plaintiffs, pp. 14-17. That would leave Defendants with no basis for refusing to implement and enforce the substantive limits of Measure 47. Defendants have not disputed that, if § (9)(f) is invalid, it must be severed in its entirety and therefore leave the remainder of Measure 47 intact and enforceable.

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4. The Circuit Court used the abbreviation "CC&E" to refer to political "campaign contributions and expenditures."

Vannatta held that Article I, § 8, did not allow a legislature in Oregon to limit political campaign contributions or expenditures in the manner of Measure 9 of 1994. Measure 47 is in many ways different from Measure 9 of 1994, including:

1. Measure 47 has a different severability clause than Measure 9, which instructed the courts "to conduct a 'clean-up' function, i.e., to examine the impact of our constitutional rulings on the balance of the provisions of Measure 9 and then to eliminate those additional sections of the measure that become ineffective as a consequence." ***Vannatta***, 324 Or at 546.

2. Measure 47's limits applicable to corporations, unions, and other entities are entirely separate from, and severable from, its limits applicable to individuals. Measure 9 defined all individuals and entities as "persons" and then adopted limitations applicable only to "persons," thus not allowing the courts to preserve the constitutionality of limits applicable only to non-individuals.

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

4. 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.

5. Measure 47 has extensive legislative findings of fact supporting and explaining the need for and state interest in each substantive provision.

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

These differences are discussed throughout the briefing.

The other issue properly before this Court is whether the substantive limits in Measure 47 are constitutional. Because Measure 47 is not the same as any prior

statute, its limits must be actually examined by the Court to determine whether they are constitutional. The Circuit Court failed to make any such examination.

1. 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. See, e.g., § (10)(a). 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 US 204, 42 SCt 281, 66 LEd 566; ***United States v. Delaware, etc.***, 213 US 367, 29 SCt 527, 53 LEd 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 US 375, 44 SCt 391, 68 LEd. 748.

Wadsworth v. Brigham, 125 Or 428, 464, 266 P 875 (1928). There is a strong presumption that a duly-enacted statute is constitutional. ***Greist v. Phillips***, 322 Or

281, 298, 906 P2d 789 (1995); ***State ex rel. Juv. Dept. v. Orozco***, 129 OrApp 148, 150, 878 P2d 432 (1994), rev den 326 Or 58, 944 P2d 947 (1997).

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).

> In construing a statute and in choosing between alternative interpretations of an ambiguous statute, this court must choose the interpretation which will avoid any serious constitutional difficulty.

State v. Duggan, 290 Or 369, 373, 622 P2d 316 (1981). *Accord*, ***State v. Meyers***, 153 OrApp 551, 560, 958 P2d 187 (1998).

2. THERE HAS BEEN NO CHALLENGE TO ANY OF THE POLITICAL CAMPAIGN CONTRIBUTION OR EXPENDITURE LIMITS IN MEASURE 47.

Literally, there has been no constitutional challenge to any of the provisions of Measure 47, other than § (9)(f) itself by the Horton Plaintiffs and Intervenors.[5]

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5. Horton Plaintiffs assert unconstitutionality under Article IV § 4(d), and Intervenors assert unconstitutionality under Article IV § 21.

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

Thus, the Circuit Court put the cart before the horse. Read in context, § (9)(f) is concerned about the constitutionality of the CC&E limits enacted by Measure 47 itself. There was no reason for the drafters of Measure 47 to be concerned about the constitutionality of CC&E limits generically or to tie the implementation of Measure 47 to some hypothetical determination about unspecified CC&E limits in some unknown future litigation, because Measure 47 enacts a specific set of limits in a specific way.

As there has been no constitutional challenge to any of Measure 47's numeric contribution limitations (or any other provision except § (9)(f)), there is no basis for Defendants to refuse to implement and enforce those limitation. In any event, the implementation of § (9)(f) requires that the courts determine the constitutionality of the provisions of Measure 47 itself, not the constitutionality of unknown provisions of some unknown other measure or statute, which is not even a judicial function.

Defendants at various points have agreed that the "limitations" referred to in § (9)(f) are the limitations in Measure 47 itself, not some unknown hypothetical other limits. 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] [hereinafter "Defendants' Summary Judgment Memorandum"], p. 9; Hazell ER 2, stated:

> Section (1)(r) [of Measure 47] then provides, "This Act shall take effect at a time when the Oregon Constitution does allow the limitations contained in this Act."

This agrees that the test is the constitutionality of "the limitations contained in this Act," not other unknown limits.

Defendants (*id.*, pp. 14-15); Hazell ER 3-4, then stated:

> Section (9)(f)'s phrase "limitation on political campaign contributions or expenditures" or close variations of it is used numerous times in Measure 47. Not surprisingly, in each and every instance it refers to limits on the amounts of CC&Es.
>
> * * *
>
> 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.

Thus, Defendants have conceded that § (9)(f) is referring to the validity of the limitations contain in Measure 47 itself, contrary to the ruling of the Circuit Court.

The drafters of Measure 47 were seeking to avoid application of ***Smith v. Cameron***, 123 Or 501, 262 P2d 946 (1928), which held that a later amendment to the Oregon Constitution did not by itself revive a statute previously held to be unconstitutional. While ***State v. Hecker***, 109 Or 520, 221 P 808 (1923), decided five years prior to ***Cameron***, concluded that a statute with a dormancy or resurrection clause somewhat similar to that in Measure 47 was not in conflict with the existing Oregon Constitution and was valid, it was not clear to the drafters of Measure 47 whether ***Hecker*** had been overruled by the later ***Cameron*** decision. Thus, they inserted § (9)(f) to ensure that the provisions of Measure 47 would go into effect as soon as they were <u>either</u> found to be constitutional in court or were deemed to be constitutional by a later amendment to the Oregon Constitution.

The Circuit Court incorrectly applied § (9)(f) by (1) concluding that it was referring to some unanticipated future court decision pertaining to unknown and unknowable future limits on campaign contributions and expenditures and (2) deciding that the court could sever 5 words from § (9)(f), thereby both changing its meaning and rendering its substantive limitations permanently unreviewable.

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

Section (9)(f) provides no basis for invalidating the severable and independently enforceable parts of Measure 47 which do not involve CC&E limits at all but instead change requirements for disclosure and reporting of campaign contributions and expenditures.

a. MEASURE 47 CONTAINS A SPECIFIC 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. ***Advocates for Effective Regulation v. City of Eugene***, 176 OrApp 370, 376, 32 P3d 228 (2001). The severability clause in Measure 47 is very specific:

> (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 § (11) is clear and unambiguous on its face, the inquiry under ***PGE v. Bureau of Labor and Industries***, 317 Or 606, 610-12, 859 P2d 1143 (1993) ("***PGE v. BOLI***") ends. Any invalid provision is severable, at the level of a "section, subsection, or subdivision," 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.[6]

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

The entire text of Measure 47 is reproduced at Horton ER 11-19. Among the independently enforceable provisions in Measure 47 that do not establish numeric limits on campaign contributions or expenditures are these 12:

1. **Section (6)(g):** Every campaign advertisement funded by "independent expenditures" in excess of $2,000 must prominently disclose the top 5

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6. In contrast, Measure 9 of 1994 contained an express interdependency clause, § 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 interdependency clause. 324 Or at 546.

contributors to the "independent" campaign, the businesses they are engaged in, and the amounts contributed by each of them.

2. **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.

3. **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.

4. **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.

5. **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.

6. **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 legal requirement.

7. **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.

8. **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."

9. **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."

10. **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."

11. **Section (10)(d):** This establishes an entirely new procedure for the filing and resolution of campaign law complaints, requiring a timely hearing before an administrative law judge, direct appeal to the Court of Appeals, and opportunity for a civil action, brought by the complainant, for enforcement of a final determination of a violation.

12. **Section (9)(c):** Campaign contributions not used in the campaign shall revert to the State Treasury to help pay for the Voters' Pamphlet. This forbids the common practice of amassing a "war chest" to use funds raised for one race in a later race for a different office against a different opponent. See §1(o).

Each of these 12 provisions is self-contained and complete and does not depend upon or relate to any numeric limitations on contributions or expenditures. Whether or not Measure 47's numeric limits on campaign contributions are upheld, these provisions are clearly capable of being enforced and are not void for lack of purpose. ***Vannatta***, 324 Or at 546. Consequently, there is no legal basis for Defendants to refuse to implement and enforce these provisions.

5. REGARDING ALL OF MEASURE 47, IMPLEMENTATION 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.

The Horton Plaintiffs and the Intervenors argue that § (9)(f) of Measure 47 is not valid under the Oregon Constitution, for different reasons. If any part of § (9)(f) is invalid, then § (11), the severability clause, severs § (9)(f) from the remainder of Measure 47.[7] The remainder of Measure 47 is then to be implemented. That leaves Defendants with no basis for refusing to implement and enforce the limitations of Measure 47. Defendants do not dispute that, if § (9)(f) is invalid, it must be severed and therefore leave the remainder of Measure 47 intact.

If § (9)(f) is valid, it 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.

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 operative portion of § (9)(f) is not triggered, unless "on the effective date of this Act, the Oregon Constitution does not allow limitations on political campaign

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7. 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 an emergency clause was severable and that its severance would not affect the validity of the remainder of the statute.

contributions or expenditures." The Circuit Court conceived of this as an abstract and categorical determination about unknown, hypothetical future CC&E limits and not the limits of Measure 47 itself. The Circuit Court then made the generic determination and concluded that § (9)(f)'s suspension clause was triggered.

This determination about some hypothetical CC&E limits (and not about any of the limits in Measure 47 itself) was error. As noted earlier in this brief (pp. 11-12), in context § (9)(f) is obviously concerned about the constitutionality of the CC&E limits enacted by Measure 47 itself, not about the constitutionality of unknown hypothetical other CC&E limits.

(2) THERE IS NO LEGAL BASIS FOR SUCH A GENERIC DETERMINATION ABOUT THE CONSTITUTIONALITY OF UNKNOWN HYPOTHETICAL LIMITS.

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 determination. In earlier cases, the Oregon Supreme Court examined specific sets of limits on political campaign contributions and expenditures and found those limits to be invalid. ***Vannatta***, *supra*; ***Deras v. Myers***, 272 Or 47, 535 P2d 541 (1975). This does not amount to an all-encompassing judicial determination that all limitations on political campaign contributions or expenditures are banned 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.[8] Oregon Constitution, Article III, §1; Article VII (Amended), §1. Cases are decided upon "adjudicative facts" [Oregon Evidence Code (Rule 201(a)], subject to being proved by evidence. Thus, there is no occasion for a judicial determination that **all** limitations on political campaign contributions or expenditures, no matter what they may be, are banned in Oregon. The determinations to date are that various 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 not tied to the numeric limitations in the 1973 statute in ***Deras*** or the Measure 9 of 1994 in ***Vannatta***.

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 Circuit Court's conclusion is further undermined by its extravagant scope--that the Oregon Constitution precludes "any limitations on CC&Es"--and the absence of facts. It is an uncalled for advisory opinion regarding any and all CC&Es. Providing advisory opinions is not a judicial function in Oregon.

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8. Although these clause do not, by their 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).

Tillamook County v. Board of Forestry, 302 Or 404, 412, 730 P2d 1214 (1986) ("challenges to future legislative amendments are not justiciable").

If not Measure 47's limitations, then what "limitations on CC&Es" are being referenced? Some sort of hypothetical numeric limits? Hypothetical non-numeric limits? And exactly which of those limits are not allowed by the Oregon Constitution? Such a conclusion requires someone to prove that every such limitation (numeric or non-numeric) on either contributions or expenditures is unconstitutional--a burden of proof no party in this case has attempted to fulfill. The Oregon Constitution clearly allows many sorts of limits on "political campaign contributions or expenditures" against which no one has launched a successful challenge.[9] If any of those limitations are constitutional, then the triggering clause in § (9)(f) is negated and therefore not triggered, even under Defendants' theory that the "limitations" are not those of Measure 47 itself.

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

The statement "the Oregon Constitution does not allow limitations on political campaign contributions or expenditures," even if conceived as some sort of generic determination divorced from Measure 47's limitations, was not true on the effective date of Measure 47 and is not true today. That means that the predicate for triggering suspension under § (9)(f) has not occurred, and Defendants' reliance upon § (9)(f) for their refusal to implement any part of Measure 47 is unfounded.

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9. See ***In re Fadeley***, 310 Or 548, 802 P2d 31 (1990).

The term "limitations" in § (9)(f) does not equate to only "numeric limits." The term "limitations" is not explicitly defined in Measure 47, but § 9(d)(1) makes clear that the term is not exclusive 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, enforced Oregon statutes contain many limitations on political contributions and expenditures, 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 for campaign purposes or to "defray an expenses incurred in connection with the recipient's duties as a holder of public office." ORS 260.407. While this does not prevent candidates from using campaign contributions (1) for trips to Hawaii to meet with potential contributors, (2) for tickets to Blazer games to socialize with potential donors, or (3) to pay friends or relatives for unsupervised work, it does constitute a "limitation" on expenditures in

> that it forbids a candidate from directly and personally pocketing campaign contributions.

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.[10]

The Oregon Supreme Court has recognized the validity of some limitations pertaining to campaign contributions and expenditures. See ***In re Fadeley***, *supra*, (upholding ban on a judicial candidate soliciting any contributions); ***Crumpton v. Keisling***, 160 OrApp 406, 982 P2d 3 (1999), *review denied* 329 Or 650, 994 P2d 132 (2000) (upholding reporting requirements on independent expenditures to support or oppose a candidate, which in effect, bans any unreported contributions).

Further, § (9)(f) refers to "limitations" in the plural. If the Oregon Constitution currently allows <u>some</u> limitations (non-numeric) but not <u>all</u> <u>possible</u> limitations (including numeric ones), how does this language apply? Clearly, the language triggers the dormancy only if the Oregon Constitution does not allow <u>any</u>

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10. ***Vannatta*** noted that some limitations involving money are permissible, such as sanctions against bribery or against corporate or union contributions or other circumstances. ***Vannatta***, 324 Or at 522 n10. Oregon has dozens of other limitations on campaign contributions, such as the requirement that every contribution be made in the name "of the person who in truth provides the contribution," ORS 260.401 (a practice referred to in the cases as money laundering). And, as Measure 47, § (9)(d)(4) states, a prohibition on the use of money in a particular manner is a numeric limitation of zero.

limitations. It does not trigger, if the Oregon Constitution allows some limitations. If some limitations are allowed, then the conditional clause ("if the Oregon Constitution does not allow limitations") is false. So the fact that the Oregon Constitution does allow some limitations means that the dormancy is not triggered at all, even if the determination made is the generic one advocated by Defendants and adopted by the Circuit Court.

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

If § 9(f) were interpreted as call for an evaluation of the specific limitations in Measure 47, such an evaluation requires examination of the constitutionality of those specific limitations. The Circuit Court undertook no such examination, despite presentation of arguments on both sides about the constitutionality of Measure 47's specific limitations.

Section (9)(f), in concert with § (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 § 9(f) itself requires court determination on whether the Oregon Constitution allows any of the specific limitations on political contributions or expenditures enacted by Measure 47. This case seeks such determinations.

Defendants below postulated that "Measure 47 itself presumed and intended that its own operative effect would depend on a constitutional change, such as adoption of Measure 46." Defendants' Summary Judgment Memorandum [OJIN

No. 28], p. 9. Hazell ER 2. This is clearly wrong, because § (9)(f) itself contemplated that the limitations in Measure 47 may well be constitutional now, with no change to the Oregon Constitution, as long as "the Oregon Constitution **is found to allow**, or is amended to allow, such limitations." The interpretation argued by Defendants would require striking the words "is found to allow, or" from the text of § (9)(f). In construing statutes, courts are "not to insert what has been omitted, or to omit what has been inserted." ORS 174.010. See ***State ex rel. Kirsch v. Curnutt***, 317 Or 92, 96-97, 853 P2d 1312 (1993). No amount of alleged context or "legislative history" can allow the court to so alter the words of the statute.

Defendants' Summary Judgment Memorandum (p. 9) cited § (1)(r) of Measure 47. All of § (1) consists of findings, not operational provisions. Section (1)(r) states:

> (r) In 1994, voters in Oregon approved a statutory ballot measure, Measure 9, establishing contribution limits similar to those in this Act, by an affirmative vote of 72 percent. The Oregon Supreme Court in 1997 found that those limits were not permitted under the Oregon Constitution. This Act shall take effect at a time when the Oregon Constitution does allow the limitations contained in this Act.

There is nothing in this section that indicates that the drafters of Measure 47 presumed the necessity of a constitutional change. The section does not even mention the need for constitutional change. It refers to the ***Vannatta*** decision as applying to the Measure 9 limits ("those limits").

Defendants then referred to legislative history, although they did not even assert that the language being construed (§ (9)(f)) is ambiguous on this point. Such a demonstration is required before resorting to legislative history. ***Kirsch v.***

Curnutt, *supra*, 317 Or at 96. Defendants referred to the ballot title and explanatory statement for a different measure (Measure 46), but none of the material referenced proves the asserted point that the drafters of Measure 47 assumed that constitutional change was absolutely required, since § (9)(f) itself contemplates that the limitations in Measure 47 could be judicially evaluated and found to be constitutional.

Everyone can agree that the adoption of Measure 46 along with Measure 47 would have ensured that all of the limitations in Measure 47 would have passed muster under the Oregon Constitution. Naturally, the proponents of Measure 47 also urged a "yes" vote on Measure 46, in order to **guarantee** the validity of all of the limitations in Measure 47. Unfortunately, Measure 46 did not pass. That does not mean that the limitations in Measure 47 are necessarily contrary to the Oregon Constitution. It just means that the constitutionality of those limitations must be adjudicated, with a strong presumption that they are constitutional. ***Wadsworth v. Brigham***, *supra*.

The Defendants' Summary Judgment Memorandum [OJIN No. 36] (p. 11) concluded: "Because the status quo is unchanged, § (9)(f) is triggered, placing the entire measure in abeyance pending a constitutional change." At best for Defendants, the triggering of § (9)(f) would place Measure 47 in abeyance pending a constitutional change or a judicial finding that any or all of its provisions are currently valid under the existing Oregon Constitution. That is why § (9)(f) refers to "the time that the Oregon Constitution is found to allow, or is amended to allow, such limitations." Section (9)(f) does not allow Measure 47 to be put into cold storage, pending a change to the Oregon Constitution. Instead, if its specific

numeric limits are adjudged to be in conflict with the current constitution, the statute is still to be codified and remain dormant until such constitutional change occurs, avoiding the potential for being *void ab initio* under ***Cameron*****,** as described at p. 12, *supra*. That is what this litigation is about.[11]

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

The Defendants' Summary Judgment Memorandum [OJIN No. 28] (p. 17) contended that § (9)(f) would be redundant of the severability clause, unless § (9)(f) is interpreted to place all of the limitations in Measure 47 in dormancy. Defendants' contention is that § (9)(f) contradicts and entirely nullifies the severability clause, § (11), as they claim § (9)(f) functions as a super-non-severability clause. While § (11) is very careful to require precise severance of any unconstitutional sections, subsections or subdivisions in Measure 47, thereby maximizing the preservation of its complete and meaningful sections, subsections and subdivisions thereof, Defendants claim that all of the provisions of Measure 47 must rise or fall together under § (9)(f).

To the contrary, § (9)(f) and § (11) are consistent. Section (11) preserves all provisions in Measure 47, except the specific sections, subsections, and subdivisions

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11. This was recognized by the Circuit Court, Letter Opinion (Horton ER 46):

> As such, intervenors' potential injury is contingent on either a change in the Constitution, which is speculative, or the Court's determination that Measure 47 in whole or part can become effective as the Hazell plaintiffs urge here, which, at least theoretically, could happen in this litigation.

that are found to be unconstitutional, in whole or in part. Section (9)(f), in order to avoid the ***Cameron*** doctrine, states that Measure 47 "shall be codified and shall become effective at the time that the Oregon Constitution is found to allow, or in amended to allow, such limitations." Section (11) and § (9)(f) serve two different functions, but those functions are consistent in seeking to preserve as much of Measure 47 as possible.

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 note 12^@11, *supra*.

The question remains about which limitations are suspended. Defendants assume that all of them are suspended, numeric and non-numeric alike, regardless of the constitutional validity of any of the specific limits. To the contrary, the courts must examine each of the limitations in the duly-enacted statute and apply ordinary constitutional analysis to determine the validity of each. Those which are invalid are then to be severed (at the level of a section, subsection, or subdivision thereof), leaving the remainder of Measure 47 in effect.

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

A. RULING OF THE TRIAL COURT, PRESERVATION OF ERROR, STANDARD OF REVIEW ON APPEAL, AND APPLICABLE FACTS.

These elements are the same for this assignment of error as for the First Assignment of Error, *supra*.

B. DISCUSSION.

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

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

Vannatta found Measure 9's limits invalid, in part due to the absence of legislative findings of fact setting forth the purposes of the limits. ***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 each of the limits and why compelling state interests are served. Those findings are entitled to near complete deference by the courts. ***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), instructing courts to give great weight to legislative findings in considering the constitutionality of an Oregon law. Further discussion on this topic is presented

in the Amicus Brief of Elizabeth Trojan and Fair Elections Oregon, filed May 14, 2008, which the Hazell Plaintiffs expressly adopt and incorporate by reference.

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

Vannatta, 324 Or at 522 n10. ***Vannatta*** left open the door for limits on political contributions or spending by corporations and unions. How this applies to Measure 47 was discussed in memoranda to the Circuit Court [OJIN Nos. 23, 30, 37] and is further examined in the Brief of Amicus Curiae the Better Government Project. In sum, Measure 47, §§ (3) and (6), contains severable limitations on political contributions and expenditures by corporations and unions. No one has stated why such independently enforceable and severable limits are in violation of ***Vannatta***. And § (11) of Measure 47 demands that such severable limitations be preserved.

In addition, ***Vannatta*** discusses Article II, § 22, and concludes that it may well remove Article I, § 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, § 22, 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.

Unlike the litigants in ***Vannatta***, the Hazell Plaintiffs below have argued for partial application of Article II, § 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.

2. *VANNATTA* RELIED UPON INCOMPLETE HISTORICAL ANALYSIS OF ARTICLE I, SECTION 8, OF THE OREGON CONSTITUTION.

Vannatta concluded that the Measure 9 limitations on CC&Es were not the sort of restrictions on speech historically allowed at the time of adoption of the Oregon Constitution. Such analysis should be applied using an accurate historical record, and it is appropriate to suggest 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). An historical record far superior to any considered in ***Vannatta*** is presented in the Opening Brief of the Horton Plaintiffs, pp. 40-49. Hazell Plaintiffs adopt and incorporate that authority and argument. That record shows that limits on political campaign contributions and expenditures were a recognized way of limiting undue influence in elections and campaigns, well before 1858.

3. *VANNATTA* RELIED UPON INCOMPLETE 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.

The relevant historical record is accurately presented in the Opening Brief of the Horton Plaintiffs in this case, which we adopt and incorporate.

4. *VANNATTA*'s CONCLUSIONS BASED ON ORIGINALISM ARE CONTRADICTED BY THE NUMEROUS STATES HAVING THREE FACTORS IN COMMON WITH OREGON.

It is no secret that ***Vannatta*** is unique in America. Use of Westlaw has produced not a single case in which the courts of another state have favorably cited ***Vannatta*** for the proposition that a state free expression clause restricts the power of the state to limit political campaign contributions. Westlaw shows only one case in which ***Buckley v. Valeo***, *supra*, was "not followed on state law grounds." Legal encyclopediae list the Oregon case as the only example of campaign contribution limits having been invalidated on the basis of a state constitution.[12]

This uniqueness calls into question the accuracy of the ***Vannatta*** historical analysis, because (1) at least 37 states have free expression clauses essentially identical to Oregon's, (2) each of those states, except one, has limits on campaign contributions, and (3) many of those states apply originalism or an historical approach to determining the meaning of their state constitutions, similar to that adopted in ***Vannatta*** and ***State v. Robertson***, 293 Or 402, 649 P2d 569 (1982).

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12. See, e.g., *Constitutional Validity of State or Local Regulation of Contributions by or to Political Action Committees*, 24 ALR 6th 179 (2008); *State Regulation of the Giving Or Making of Political Contributions Or Expenditures by Private Individuals*, 94 ALR3d 944 (2008).

At least 37 states currently have "free speech" clauses either identical to Oregon's or functionally identical, most of which were adopted in the late 1700s and early 1800s, prior to the Oregon Constitutional Convention of 1857.[13]

Alaska	Iowa	New Mexico
Arizona	Kansas	New York
Arkansas	Kentucky	North Dakota
California	Maine	Ohio
Colorado	Maryland	Oklahoma
Connecticut	Michigan	Pennsylvania
Delaware	Minnesota	South Dakota
Georgia	Missouri	Tennessee
Florida	Montana	Texas
Idaho	Nebraska	Virginia
Illinois	Nevada	Washington
Indiana	New Jersey	Wisconsin
		Wyoming

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.[14] Other states have adopted a Bill of Rights formulation more closely akin to the U.S. Constitution. Of these 37 states,

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13. For example, Kentucky (admitted 1792, constitution 1799), Louisiana (admitted 1812, constitution with free expression provision 1848), Alabama (admitted 1813, constitution 1819), Florida (constitution 1838, admitted 1845), Indiana (admitted 1816), Illinois (admitted 1818), Missouri (admitted 1820), Ohio (admitted 1803), Michigan (admitted 1837), Texas (constitution 1845), California (constitution 1850), Minnesota (constitution 1858). The constitutions of Connecticut, Delaware, George, Maryland, New York, New Jersey, Pennsylvania, and Virginia were adopted near the time of the 1789 constitutional convention.

14. This list was produced by doing a natural language search in the Westlaw state constitutions database, using the language of Article I, § 8, as the search term. An earlier version of this search is printed in the Declaration of Daniel W. Meek [OJIN No. 25] by a printout of a Westlaw search for the relevant terms. Hazell ER 9.

36 have numeric limits on political contributions; only New Mexico does not.[15] Our examination of the decisions of each state's highest court has yet to discern an approach to constitutional interpretation different from the originalism or historical analysis applied in ***Vannatta*** or ***Robertson***.[16]

Yet, none of highest courts of those states has struck down limits on political campaign contributions or expenditures as contrary to the state constitution free expression clause. This would indicate no support for the conclusion that these free expression clauses in state constitutions at the time of the adoption of the Oregon Constitution were believed to have banned limitations on CC&Es.

Thus, application of the originalist approach to 36 state constitutions with free expression clauses equivalent to Oregon's has yet to produce even a single decision that comes to the same result as ***Vannatta***.

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15. 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.

16. See, e.g., ***Golden Gateway Center v. Golden Gateway Tenants Association***, 26 Cal4th 1013, 29 P3d 797 (2001) (free speech clause); ***Bush v. Holmes***, 886 So2d 340 (Fla 2004); ***Malone v. Shyne***, 936 So2d 1279 (LaApp 2006); ***Archer Daniels Midland Co. v. Seven Up Bottling Co.***, 746 So2d 966 (Ala 1999); ***American Bush v. City of South Salt Lake***, 140 P3d 1235 (Utah 2006) (free speech clause); ***McIntosh v. Melroe Co.***, 729 NE2d 972 (Ind 2000); ***Golden v. Johnson Memorial Hosp., Inc.***, 66 ConnApp 518, 785 A.2d 234 (2001).

5. INDIANA, THOUGHT TO BE THE SOURCE OF OREGON'S ARTICLE I, § 8, HAS STRICT LIMITS ON POLITICAL CAMPAIGN CONTRIBUTIONS AND EXPENDITURES.

Article I, § 8, of the Oregon Constitution is verbatim to a provision in the Indiana Constitution, which has been thought to be its model. Claudia Burton and Andrew Grade, *A Legislative History of the Oregon Constitution of 1857-Part I,* 37 WILLAMETTE L REV 469, 526 (2001). As shown by the Opening Brief of the Horton Plaintiffs, pp. 30-33, many states had essentially the same free expression clause at the time of the adoption of the Oregon Constitution (along with a close analog to Article II, § 8), including Kentucky, Mississippi, Connecticut, Alabama, Florida, Texas, Louisiana, and California. Additionally, before 1858 Vermont,[17] Michigan,[18] Iowa,[19] and New Jersey[20] had in place very close analogs to Oregon's Article I, § 8. As of 2002, all of these states had limits on political campaign contributions.[21] The limits in Indiana are stated in Attachment A to the

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17. (1793 version) Chapter I, § 13: The people have a right to a freedom of speech, and of writing and publishing their sentiments concerning the transactions of government, and therefore the freedoms of the press ought not to be restrained.

18. (1835) Art I, § 7: Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right: and no laws shall be passed to restrain or abridge the liberty of speech or the press.

19. (1844) Art II , § 7: Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or the press.

20. (1844 Constitution) Art I, § 5: Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty.

21. 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.

Declaration of Daniel Meek (FEC's summary of Indiana campaign finance laws) [OJIN No. 25]. 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).[22] 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.[23]

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

23. In the most recent full election cycle in Oregon (2006), one union contributed over $1.0 million in candidate races, another contributed over $998,000, and so on. In 2002, one union contributed over $1.1 million in candidate races, another contributed over $519,000, and so on. In 2006, individual corporations and/or a corporate association contributed to candidate committees as much as $300,000 (American Justice Partnership) or $100,000 (DR Johnson Lumber). In 2002, individual corporations contributed to candidate committees as much as $250,000 (Clebob Seattle Investments) or $221,000 (Seneca Jones Timber). 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

(continued...)

Indiana adopted its constitution in 1851, with the identical free expression clause as Oregon used in 1857. Indiana has also adopted the doctrine of constitutional originalism, requiring that the Indiana Constitution be interpreted in light of the knowledge and intent of its framers.[24] The Horton Opening Brief

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23.(...continued)
contributed to one individual candidate as much as $766,000 (Loren Parks in 2006), $440,000 (Loren Parks in 2002), $375,000 (Roderick Wendt in 2006), $355,000 (William Swindells in 2006), $350,000 (William Colson in 2006), $261,000 (Betty Roberts in 2002), $257,550 (Joan Austin in 2002), $250,000 (Norman Brenden), $242,500 (Rodereick Wendt in 2002), $188,000 (Richard Wendt in 2002), and so on.

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

http://www.followthemoney.org/database/StateGlance/contributor_details.phtml?s=OR&y=2006

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.

24. Proper interpretation and application of a particular provision of the Indiana Constitution requires a search for the common understanding of both those who framed it and those who ratified it. ***Collins v. Day***, 644 N.E.2d 72, 75-76 (Ind. 1994); ***Bayh v. Sonnenburg***, 573 N.E.2d 398, 412 (Ind.1991). Furthermore, "the intent of the framers of the Constitution is paramount in determining the meaning of a provision." ***Boehm v. Town of St. John***, 675 N.E.2d 318, 321 (Ind. 1996); ***Eakin v. State ex rel. Capital Improvement Bd. of Managers of Marion County***, 474 N.E.2d 62, 64 (Ind. 1985). In order to give life to their intended meaning, we "examin[e] the language of the text in the

(continued...)

supplies evidence that Oregon convention delegates had copies of the Indiana Constitution (and all other extent state constitutions) with them during the Constitutional Convention. Are we to conclude that the Indiana constitutional convention delegates had an entirely different world view and that the Indiana framers must have known more about limits on political contributions and expenditures in 1851 than the Oregon framers knew in 1857, because the limits on campaign contribution and expenditure in Indiana have never been struck down, despite Indiana's exact same free expression clause and its doctrine of constitutional originalism.

If space permitted, we could make this same showing for Connecticut and others of the 36 states listed in the preceding section.

6. THE HISTORICAL ANALYSIS IN *VANNATTA* PLACED THE BURDEN OF PROOF ON THE WRONG PARTY.

The approach of ***Vannatta*** was to find unconstitutional any limitation on speech that could not be documented as an historical exception to the protections of

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24.(...continued)

> context of the history surrounding its drafting and ratification, the purpose and structure of our constitution, and case law interpreting the specific provisions." ***Indiana Gaming Comm'n v. Moseley***, 643 N.E.2d 296, 298 (Ind. 1994). See also ***Price v. State***, 622 N.E.2d 954, 957 (Ind. 1993); ***State Election Bd. v. Bayh***, 521 N.E.2d 1313 (Ind.1988). In construing the constitution, we "look to the history of the times, and examine the state of things existing when the constitution or any part thereof was framed and adopted, to ascertain the old law, the mischief, and the remedy." ***Sonnenburg***, 573 N.E.2d at 412 (citing ***State v. Gibson***, 36 Ind. 389, 391 (1871)).

McIntosh v. Melroe Co., 729 N.E.2d 972, 985 (Ind 2000).

Article I, § 8. But this approach itself is contradicted by the contemporaneous understanding of the meaning of the free speech clauses of the state constitutions.

> The most respected commentor on state constitutions was Thomas Cooley.
>
> The standard general work on state constitutional interpretation was Thomas M. Cooley's A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATE OF THE AMERICAN UNION, first published in 1868 and updated in numerous subsequent editions. Many courts relied on this work as authority, referring to it simply as "Cooley's Constitutional Limitations." That work, however, is now very far out of date, but still relied upon by a number of state courts.

R.F. Williams, *Interpreting State Constitutions as Unique Legal Documents*, OKLAHOMA CITY UNIVERSITY LAW REVIEW (Spring 2002), p. 193 (footnotes omitted). Cooley in his original 1868 treatise stated that the free expression clauses of state constitutions were not intended to grant new rights but instead to prevent the erosion of existing free expression rights recognized by the common law.

> It is to be observed of these several provisions, that they recognize certain rights as now existing, and seek to protect and perpetuate them, by declaring that they shall not be abridged, or that they shall remain inviolate. They do not create new rights, but their purpose is to protect the citizen in the enjoyment of those already possessed. We are at once, therefore, turned back from these provisions to the common law, in order that we may ascertain what the rights are which are thus protected, and what is the extent of the privileges they assure.

Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATE OF THE AMERICAN UNION (Little, Brown 1868), pp. 416-17 (http://books.google.com/books?id=vOI9AAAAIAAJ).

Thus, the correct question for historical analysis is whether the residents of Oregon had a common law right to make unlimited political campaign contributions and expenditures, unlimited by statute. Absent proof of such a common law right,

Article I, § 8, did not by itself create such a right, as the free expression clauses in state constitutions, as understood by the leading commentator in 1868, did not create new rights.

Vannatta thus placed the burden of historical proof on the wrong side by requiring proof that limits on CC&Es were a recognized historical exception to free speech protection.[25]

7. THE STATE CLAIMS IN BRIEFING ELSEWHERE THAT MONEY PROVIDED TO INFLUENCE A PUBLIC OFFICIAL OR CANDIDATE CAN BE LIMITED UNDER ARTICLE I, SECTION 8.

In ***Vannatta v. Oregon Government Ethics Commission***, Marion County Circuit Court No. 07C20464, the State of Oregon argues that providing money "is Article I, Section 8 expression but not protected," if it "is an attempt to influence the recipient public official or candidate."[26] It is not protected, because, according to the State, it is a bribe.

> The gift is either (a) a pure gift and therefore "not expression" for purposes of Article I, section 8 or (b) within the ORS 162.015 definition of bribery and is therefore not "protected expression." See [***Vannatta***] at 522 n10. Stated another way, if the gift is made with the intent that to cause the public official to behave favorably toward the donor, the gift is subject to the historical exception for such transactions.

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25. This issue regarding how state free expression clauses were contemporaneously understood as granting no new rights is not addressed in ***State v. Ciancanelli***, 339 Or 282, 121 P3d 613, 618 (2005).

26. Defendants' Memorandum Opposing Plaintiffs' Motion for Preliminary Injunction and in Support of Defendants' Motion for Summary Judgment, *VanNatta v. Oregon Government Ethics Commission and State of Oregon*, Marion County Circuit Court No. 07C-20464 (November 13, 2007), pp. 7, 8 [hereinafter "State Memorandum on Gifts"].

State Memorandum on Gifts, p. 8 (Hazell Appendix 3). The Circuit Court agreed, stating that something "given with an anticipated *quid pro quo*" is "therefore, a bribe, which is not protected expression." Letter Opinion of December 20, 2007 (Hazell Appendix 9).

Measure 47, § (1), finds that large campaign contributions are given precisely for the purpose of causing public officials to behave favorably toward the donors. Section (1)(c) states:

> (c) Large contributions distort the political process and impair democracy, with these adverse effects:
>
> (1) Corrupting public officials and causing them to take actions that benefit large contributors at the expense of the public interest;
>
> (2) Causing public officials to grant special access and accord undue influence to large contributors;
>
> (3) Significantly impairing the opportunity for voters to hear from candidates who do not accept large contributions and for those candidates to communicate with voters; and
>
> (4) Fostering the appearance of corruption and undermining the public's faith in the integrity of elected officials and the political process.

Section (1)(j) then provides examples of such actions. Consequently, such contributions can be banned or regulated under the bribery exception to Article I, Section 8, according to the argument presented by the State.[27]

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27. Hazell Plaintiffs acknowledge that ***Vannatta*** did not categorize all campaign contributions as bribes, but the State now argues that whatever is given in order to influence the recipient public official or candidate" is within the bribery exception. Further, Measure 9 of 1994 contained no findings that campaign contributions seek to influence public officials. As the State argues, if benefit or advantage is expected in return, a "gift" lacks the disinterested donative intent noted in ***Vannatta*** n10 is a bribe which can be banned or regulated. Measure 47 captures this concept from ***Vannatta*** n10.

8. LIMITS ON CAMPAIGN CONTRIBUTIONS AND INDEPENDENT EXPENDITURES ARE NOT RESTRICTIONS ON EXPRESSION OR THE CONTENT OF SPEECH.

Nothing in Measure 47 prevents individuals or entities from expressing their support or opposition to candidates for public office or from expressing any opinion whatsoever.[28] They are all free to speak, write, and publish on this subject. Measure 47 regulates only the conduct or action of making campaign contributions and independent expenditures beyond certain limits. Measure 47 does not proscribe expression. Instead, it proscribes the harm of undue influence of money on candidates and officeholders who depend upon large campaign contributions in order to be elected. See Measure 47, § (1).

Vannatta concluded that a campaign contribution is expression.

> However, the contribution, in and of itself, is the contributor's expression of support for the candidate or cause--an act of expression that is completed by the act of giving and that depends in no way on the ultimate use to which the contribution is put.

Vannatta, 324 Or at 521.[29] This misses the point. Measure 47, § (1), finds that campaign contributions are given in order to obtain (1) special access to the candidate or officeholder by the donor and (2) special treatment by officeholders

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28. Measure 47 on its face does not forbid speech. If a statute "does not on its face forbid speech, it follows that the statute does not on its face violate rights protected by Article I, section 8." Slate v. Chakerian, 325 Or 370, 380, 938 P2d 756 (1997).

29. ***Vannatta*** did not find that a campaign contribution or expenditure is speech or offends the Article I, Section 8 "right to speak, write, or print freely on any subject." The act of giving money, whether by check or credit card or electronic transfer, is not speaking, writing, or printing.

receiving the contributions. The conclusion that campaign contributions are necessarily expression is particularly countered by Measure 47, § 1(g):

> Contributions are given also to obtain access to and the favor of whichever candidate is elected. In 2002, almost 40% of money contributed to the legislative leadership political committees came from donors who contributed to both the Republican leadership committees and to the Democratic leadership committees.

Thus, campaign contributions seek to obtain access and favor, not necessarily to express support. When contributions are given to all of the candidates seeking an office, where is the expression of support? Seeking access or favor is not the expression of an "opinion," which is what Article I, § 8, protects. These contributions indicate mere attempts to curry favor with both candidates--a purely financial maneuver.

Further, Measure 47 does not prevent any individual from expressing support for a candidate via a campaign contribution (of up to $500, twice, in a statewide race and $100, twice, in a non-statewide race). As noted in ***Buckley v. Valeo***, 424 US 1, 96 SCt 612, 46 LEd2d 659 (1976), expression of support occurs when a contribution is made, regardless of its size.

> The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.

424 US at 635-36. Measure 47 also allows any individual to make independent expenditures of up to $10,000 per year on races for non-federal Oregon offices. Thus, Measure 47 does not impair the opportunity for anyone to express support for a candidate (or opposition). It merely establishes that the avenue is not a superhighway with no lines and no speed limits. It is akin to the content-neutral time, place, and manner restrictions upheld in ***Outdoor Media Dimensions, Inc. v. Dept. of Transportation***, 340 Or 275, 132 P3d 5 (2006) (size and placement of billboards), and in ***State v. Rich***, 218 OrApp 642, 180 P3d 744 (2008) (statute prohibiting "unreasonable noise").[30]

Measure 47 does not apply to the content of any expression. It does not stop candidates or anyone else from speaking, writing, or printing anything. Under Measure 47, all persons are free, in addition to making contributions and expenditures, to use 100% of their volunteer time and effort to support or oppose candidates. Measure 47 just stops corporations and unions and others from providing money to obtain access and favors from politicians in exchange for expanding the dissemination of the candidate's speech. It is undisputable That money provides an overwhelming megaphone for the speech of those candidates receiving the large contributions. See Measure 47, § (1)(d) (documenting that the bigger spenders win over 90% of the legislative races in Oregon). ***Vannatta*** states:

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30. 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.

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

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

The two graphs contained in the Hazell Plaintiffs' Motion for Summary Judgment and Memorandum in Support (February 16, 2007) [OJIN No. 23] show the Current Oregon Political Money System and the Measure 47 system.[31] 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.

The Measure 47 CC&E limits are not content-based. The act of giving money may be expression, but it 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 Court has not explained why Article I, § 8, does not allow numeric limits on contributions 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

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31. These graphs are shown at Hazell ER 7-8.

not also aimed at the content of political speech and thus prohibited? ***Vannatta*** thus logically requires the invalidation of all campaign finance disclosure and reporting requirements.

9. MEASURE 47 FOCUSES ON THE HARMS OF UNLIMITED CONTRIBUTIONS, NOT ON SUPPRESSING CONTENT OF THE SPEECH.

The Oregon Supreme Court has allowed limitations on speech by laws that "focus on proscribing the pursuit or accomplishment of forbidden results rather than on the suppression of speech or writing."[32] ***State v. Ciancanelli***, 339 Or 282, 296, 121 P3d 613 (2005).

> [A]mong the various historical crimes that are "written in terms" directed at speech, those whose *real* focus is on some underlying harm or offense may survive the adoption of Article I, section 8, while those that focus on protecting the hearer from the message do not.
>
> * * * Although the laws making those acts criminal [perjury, etc.] may be "written in terms" directed at speech, all those crimes have at their core the accomplishment of present danger of some underlying actual harm to an individual or group, above and beyond any supposed harm that the message itself might be presumed to cause to the hearer or to society. * * * Article I, section 8, is concerned with prohibitions that are directed at the content of speech, not with prohibitions that focus on causing palpable harm to individuals or groups.

In addition to the harm to public trust in the judiciary noted in ***Fadeley***, an example of harm to a group which is "above and beyond" the message to the hearer

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32. Another example is presented in ***In re Fadeley***, 310 Or 548, 802 P2d 31 (1990), where the Oregon Supreme Court 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 in "the appearance of judicial integrity." *Id.*, 310 Or at 564. The important societal interests in limiting political campaign contributions and expenditures are set forth in detail in § (1) of Measure 47.

is found in ***Stoneman***, *supra*. While the restriction on pornography was a pure restriction on expressive content, the Court found it valid because it was intended to prevent harm to a vulnerable group--children (even though the statute made no explicit reference to such harm). Exploitation of children is a harm entirely distinct from any asserted harm that prurient materials may cause to an observer. Likewise, even if limits on political campaign contributions and expenditures were pure restrictions on speech based on its content, they are justified by preventing the harm that unlimited political spending imposes upon democracy, as expressly set forth in the text of Measure 47 itself, including its § (1).

10. LIMITS ON RECEIVING CAMPAIGN CONTRIBUTIONS ARE WITHIN THE INCOMPATIBILITY EXCEPTION TO ARTICLE I, SECTION 8.

In re Fadeley, 310 Or 548, 802 P2d 31 (1990), 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 in "the appearance of judicial integrity." *Id.*, 310 Or at 564. The important societal interests in limiting political campaign contributions and expenditures are set forth in detail in § (1) of Measure 47.[33]

Vannatta, however, characterized the ***Fadeley*** decision as hinging on the "incompatibility exception" to Article I, § 8. It rejected that exception, because "it

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33. The Court in ***Fadeley*** used the balancing approach familiar in First Amendment litigation. Such a test would validate contribution limits, as in Measure 47, as it has in other cases involving contribution limits, such as ***Buckley v. Valeo***, *supra*, and ***Shrink Missouri***, *supra*.

cannot be contended that the expression in question (contributions) actually impairs performance of, e.g., legislative functions in all cases." 324 Or at 542. But the legislature has now found, as fact, that contributions of unlimited size do generically and universally impair the legislative function. Measure 47, § (1) (*passim*). The courts are not free to contradict these legislative findings, which did not exist when ***Vannatta*** was decided.

And, even in the absence of similar findings, the Marion County Circuit Court in ***Vannatta v. Oregon Government Ethics Commission***, *supra*, upheld (at the State's urging) a complete ban on gifts to public officials in excess of $50 under the incompatibility exception, stating "the giving of unlimited gifts to public officials and candidates is incompatible with their official duties." Hazell Appendix 11.

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

All of the arguments above assume that the ***Vannatta*** approach to applying free speech rights to political campaign contributions and expenditures is controlling and will remain so. The Hazell Plaintiffs adopt and incorporate the authority and the discussion in the Opening Brief of the Horton Plaintiffs that the conclusions reached in ***Vannatta*** should be reconsidered because of new primary source information which permits a far more vital--and correct--understanding of the mileau of the framers and voters who adopted the Oregon Constitution, particularly, pp. 18-39.

Now the Hazell Plaintiffs urge a distinctly different argument: that this absolutist approach of ***State v. Robertson*** and its progeny itself be abandoned as

applied to CC&Es. We respectfully suggest that the Oregon courts should adopt the approach of the United States Supreme Court and the highest court of every other state applying free speech rights to limits on campaign contributions and expenditures. While not undertaken lightly, Oregon Supreme Court decisions are subject to reversal. This is the lesson of ***Stranahan v. Fred Meyer, Inc.***, *supra*.

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

In general, we 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. These courts have found contribution limits to be consistent with both federal and state freedom of speech guarantees.

Vannatta is but one in a series of Oregon Supreme Court decisions involving Article I, § 8, since ***State v. Robertson***, 293 Or 402, 649 P2d 569 (1982), which appear inconsistent. The essential difference between (1) the accepted United States Supreme Court analysis of free speech under the First Amendment (2) the ***Robertson*** analysis of free speech under Article I, § 8, is that the First Amendment cases recognize that restrictions on speech can be justified by either important or compelling state interests. The ***Robertson*** approach (as applied in ***Vannatta***) invalidates restrictions on speech, regardless of the justifications offered (apart from the historical exception). But other cases invoking ***Robertson*** have upheld restrictions on speech due to the other interests served. The interests served by the limits in Measure 47 are set forth in § (1) of Measure 47. See Landau, *Hurrah for*

Revolution: A Critical Assessment of State Constitutional Interpretation, OREGON LAW REVIEW Winter 2000, pp. 851-52. Other legal scholars have questioned the validity of the ***Robertson*** analysis. See, e.g., Long, *Free Speech in Oregon: A Framework under Fire*, OREGON STATE BAR BULLETIN (October 2003); West, *Arrested Development: An Analysis of the Oregon Supreme Court's Free Speech Jurisprudence in the Post-Linde Years*, 2000 ALBANY LAW REVIEW 1237.

b. THIS IS THE FIRST CASE FOR WHICH *VANNATTA* IS CLAIMED TO BE PRECLUSIVE.

State v. Ciancanelli, *supra*, 339 Or at 290-291, explained that, even if a 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. Here, the ***Vannatta*** decision was rendered 11 years ago (February 1997). There has been no intervening precedent which has relied on ***Vannatta*** to strike down 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.

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

The Second Claim below sought injunctive relief upon the same basis as the declaratory relief sought in the First Claim. Thus, the ruling of the trial court, the preservation of error, and the standard of review upon appeal are the same as for the First and Second Assignments of Error.

The applicable facts, as alleged in the Complaint and not disputed by Defendants, are that 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 § (9)(f), as alleged in the Complaint. Horten ER 1-10. Pursuant to ORS 28.080, ORS 183.486(1), ORS 183.490, and ORS 246.910, *inter alia*, the Hazell Plaintiffs are entitled to an order directing Defendants to administer and enforce all provisions of Measure 47, as of December 6, 2007, or all parts of Measure 47 that are not ruled to be unconstitutional.

VI. CONCLUSION.

This Court should remand to the Circuit Court with instructions to grant summary judgment on the Hazell Plaintiffs' First and Second Claims for Relief and to order relief accordingly.

Dated: May 23, 2008

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I FILED the original and 20 copies, and further that I SERVED 2 true copies of the foregoing Hazell APPELLANTS' OPENING BRIEF AND EXCERPTS OF RECORD/APPENDIX by mailing 2 true copies to all other parties listed below, deposited in the U.S. Postal Service at Portland, Oregon, with first class postage prepaid.

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