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

COMBINED REPLY AND CROSS-ANSWERING BRIEF OF THE HORTON PLAINTIFFS

Appeal from the Judgment of the Circuit Court or Marion County

Honorable Mary Mertens James, Judge

LINDA K. WILLIAMS
OSB No. 78425
10266 S.W. Lancaster Road
Portland, OR 97219
503-293-0399 voice
503-245-2772 fax
linda@lindawilliams.net

Attorney for Plaintiffs-Appellants/
Cross-Respondents
Joan Horton and Ken Lewis

(attorneys continued inside cover)

April 2009

DANIEL W. MEEK
OSB No. 79124
10949 S.W. 4th Avenue
Portland, OR 97219
(503) 293-9021 voice
(503) 293-9099 fax
dan@meek.net

Attorney for Plaintiffs-Appellants Cross-Respondents
Bryn Hazell, Francis Nelson, Tom Civiletti,
David Delk, and Gary Duell

JOHN R. KROGER, OSB No. 07720
Oregon Attorney General
(503) 378-4400 (voice)
ROLF C. MOAN, OSB No. 92407
Acting Solicitor General
(503) 378-4402 (voice)
(503) 378-6306 (fax)
Oregon Department of Justice
CECIL RENICHE-SMITH
Assistant Attorney General
Oregon Department of Justice
1162 Court Street N.E.
Salem, OR 97201-4096
Attorneys for Defendants-Respondents Cross-Respondents
Kate Brown and John Kroger

JOHN A. DILORENZO, OSB No. 802040
GREGORY A. CHAIMOV, OSB No. 822180
Davis Wright Tremain LLP
1300 S.W. 5th Avenue #2300
Portland, OR 97201
503-241-2300 voice
503-778-5299 fax
johndilorenzo@dwt.com
gregorychaimov@dwt.com

Attorneys for Intervenors-Respondents Cross-Appellants
Fred Vannatta and Center to Protect Free Speech

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OREGON CONSTITUTION

STATUTES

MISCELLANEOUS

Bryn Hazell, Francis Nelson, Tom Civiletti, David Delk, and Gary Duell ("the Hazell Plaintiffs") and Joan Horton and Ken Lewis ("the Horton Plaintiffs") filed separate notices of appeal and separate Opening Briefs. The Horton Plaintiffs file herein their Combined Reply and Cross-Answering Brief, which is joined and/or adopted by the Hazell Plaintiffs, with the consent of the Horton Plaintiffs. The Horton Plaintiffs also join and/or adopt the Reply Brief of the Hazell Plaintiffs, also filed this day, with the consent of the Hazell Plaintiffs.

Cross-Appellants Center to Protect Free Speech and Fred Vannatta (hereinafter "Intervenors") were intervenors in the case below. All the Horton/Hazell Plaintiffs dispute the Intervenors' arguments. Section (9)(f) is not unconstitutional because of some quibble over the "effective" date versus "date of operative effect" or because it assigns an unconstitutional role to the judiciary.

Plaintiffs do, however, agree with one point made by Intervenors [Cross-Appellants' Opening Brief] (pp. 20-21)[1]: The trial court logically erred in determining that § (9)(f) renders all of Measure 47 presently inoperative. If all of Measure 47 is inoperative, that would render § (9)(f) inoperative as well.

The Hazell Plaintiffs made a similar argument in their Opening Brief, pp. 9-13. There they argued that the proper construction of § (9)(f) required that a court examine each term in Measure 47 to determine whether or not each term was in conflict with the Oregon Constitution. Hazell Opening Brief, pp. 16-28. Indeed, no one has challenged any of the provisions of Measure 47 as unconstitutional (except (9)(f) itself).

---

1. All parenthetical page references in the text refer to the Cross-Answering Brief filed by Intervenors.

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.

REPLY BRIEF

II. REPLY REGARDING HORTON PLAINTIFFS' FIRST ASSIGNMENT OF ERROR: THE COURT ERRED IN DENYING HORTON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN GRANTING DEFENDANTS' MOTION.

A. THE COURT SHOULD CONSIDER THE VALIDITY OF § (9)(f) FIRST.

In the November 6, 2006, general election, Oregon voters passed Measure 47, a statute setting forth a detailed system of campaign finance reform for state and local candidates. Measure 46 was a constitutional amendment to guarantee that Measure 47 would not run afoul of the Oregon Constitution. Measure 46 failed, leaving the constitutionality of Measure 47's provisions subject to question.

Measure 47 contains, *inter alia*, limitations on dollar contributions to state and local candidate campaigns and new provisions on reporting and disclosure of contributions and expenditures, as well as the clause at issue, § (9)(f) of Measure 47, which 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.

ER 18 of Horton Opening Brief and Excerpts of Record.

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. Defendants have now affirmatively agreed that, if § (9)(f) is invalid, it must be severed in its entirety and therefore leave the remainder of Measure 47 intact and having "immediate operative effect." State's Brief, p. 50. Accordingly, the Court should first determine whether or not § 9(f) is itself a valid dormancy clause.

B. DEFENDANTS DO NOT ENGAGE THE HORTON PLAINTIFFS' ARGUMENTS.

Should the Court then construe the terms of Measure 47, Horton Plaintiffs had three main arguments:

1. Measure 47's limits on campaign contributions and expenditures[2] are authorized by Article II, § 8, regardless of Article I, § 8.[3]

2. Such limits are within the "historical exception" to restrictions upon free speech [***State v. Robertson***, 293 Or 402, 412, 649 P2d 569 (1982)], regardless of the interpretation of Article II, § 8.

3. The doctrine of contemporaneous construction shows that the validity of limits on political contributions was recognized for over 120 years prior to ***Vannatta***, while limits on political expenditures for recognized for over 100 years prior to ***Deras v. Myers***, 272 Or 47, 535 P2d 541 (1975).[4]

The State offers no reply on any of these three main points, nor does it comment upon the historical and primary sources offered by the Horton Plaintiffs, who continue

---

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

3. When this brief refers to an Article, it is referring to an Article of the Oregon Constitution, unless otherwise stated.

4. ***Deras*** struck down the aggregate limits on expenditures by a candidate enacted by the Oregon Legislature in 1973. Measure 47 contains no aggregate limits on expenditures by any candidate.

to urge reconsideration of ***Vannatta v. Keisling***, 324 Or 514, 931 P2d 770 (1997), and argue it should not be followed in this case because:

(1) Measure 47 presents unique factual findings directed at the effects of unlimited campaign contributions (discussed in the Reply of the Hazell Plaintiffs); and

(2) The presumed historical facts in ***Vannatta*** are incorrect; an overwhelming abundance of primary source material indicates that Article II, § 8, of the Oregon Constitution, was understood at the time to apply to regulation of campaign activity, and other states had laws in place which did restrict campaign contributions under the authority of constitutional clauses identical or nearly identical to Article II, § 8, despite the presence in their constitutions of free expression clauses identical or nearly identical to Article I, § 8.

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. But such a conclusion should be applied using an accurate historical record. An historical record far superior to any considered in ***Vannatta*** is presented in the Opening Brief of the Horton Plaintiffs, pp. 40-49, which shows that limits on political campaign contributions and expenditures were a recognized way of limiting undue influence in elections and campaigns, well before 1858.

The State's Brief offers no response, except (p. 41) to quote ***Vannatta*** that the Secretary of State in that case did not argue for, and the Court on its own did not find evidence of, an historical exception. To the contrary, here we have fully documented the historical exception. The Horton Plaintiffs argue that the existence of the laws of Maryland, New York--and particularly--Texas are examples of historical exceptions within the meaning of ***Robertson***. These early limitations on campaign expenditures satisfy the Horton Plaintiffs' burden (as proponent of an exception) of making more than a "mere showing of some legal restraints on one or another form of speech or writing" existed. ***State v. Henry***, 302 Or 510, 521, 732 P2d 9 (1987); ***State v. Ciancanelli***, 339 Or 282, 296, 121 P3d 613 (2005).

The weakness in ***Vannatta***'s historical analysis does not necessarily vitiate the framework set out in ***State v. Robertson***, 293 Or 402, 412, 649 P2d 569 (1982), which concluded that Article I, § 8, contains a broad prohibition on restraints on expression (unless the statute is aimed at effects and not the content of speech itself) and recognized that even statutes which are directed a speech may be permissible under an historical exception.[5] However, the wealth of historical material now supplied by the Horton Plaintiffs illustrates that the ***Robertson*** analysis must depend on a more rigorous historical examination than that employed in ***Vannatta***.

A problem with implementing the ***Robertson*** analysis is (1) the absence of any guidelines about what "history" is and (2) a lack of standards for judicial use of the historical method, once a threshold determination is made that "history" is relevant. Courts rarely announce that they are undertaking a review of historical facts outside the events in a specific controversy, but they do so often, as in looking outside the text of a statute to discern legislative intent or trace the development of an area of law.

Thus, "history" is subsumed under the task of seeking the "context" of a law as an aid in interpretation, and the quality of historical evidence is not given independent scrutiny for a proper foundation as would be required for the receipt of scientific evidence.[6] Once the court recognizes the need for this historical knowledge, it should approach its consideration of historical facts with respect for the historical method (rigorous collection and organization of evidence, verification of the authenticity and

---

5. The Court specifically identified, as examples of historical exceptions, the crimes of "perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud and their contemporary variants." *Id.*

6. See ***State v. O'Key***, 321 Or 285, 899 P2d 663 (1995), and ***State v. Brown***, 297 Or 404, 687 P2d 751 (1984). Whether evidence is "scientific" and whether it meets standards for admissibility are questions of law. See, e.g., ***O'Key***, 321 Or at 289-322. These questions are reviewed on appeal *de novo*. 321 Or at 320 n 45.

veracity of information and its sources, evidence of bias in sources, integrity of the underlying documentary evidence, and similar standards).

The legal principles which foster conformance with case law precedent and offer finality for adjudicated facts[7] should not be confused with accurate historical facts and methods. Precedent requires that an earlier conclusion of law be followed because both cases raise the same issue (or at least, a very similar issue which can be reasoned by analogy from the earlier case). Cases adjudicate record facts in the matter before the court. Neither legal precedent nor case-by-case adjudication can "decide" historical facts or bind future litigants conclusively.

In this case, as a matter of undisputed historical record, other states had adopted campaign contribution limits before the Oregon Constitutional Convention was held, and those states had constitutional provisions very similar to both Article I, § 8 and Article II, § 8. ***Vannatta*** should not be "followed" as binding on the historical facts it claims to discern from a single source, WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828), in the face of myriad examples from multiple, widely circulated sources refuting Webster's narrow ascribed meaning of the word "election."

III. REPLY REGARDING HORTON PLAINTIFFS' SECOND ASSIGNMENT OF ERROR: THE COURT ERRED IN DENYING HAZELL PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN GRANTING DEFENDANTS' MOTION.

The Opening Brief of the Horton Plaintiffs assigned error to the trial court's denial of the summary judgment motion of the Hazell Plaintiffs. We now address a portion of the State's Brief that argues against this assignment of error.

The State's Brief (p. 37) asserts:

---

7. A number of strategies, such as requiring all claims to be stated in a complaint or lost, the doctrines of *collateral estoppel* and *res judicata*, as well as statutes of ultimate repose, all operate to foreclose relitigation of adjudicated facts.

> The CC&E limits in Measure 47 are not, for all practical purposes, distinguishable from those struck down by the court in ***Vannatta***, and this court is bound by ***Vannatta***.

First, commenting about the practical application of a limit is an assertion of fact, and the State has provided no factual basis for this assertion. Second, the issue is the meaning of Measure 47 for legal purposes, not practical purposes. Third, the remainder of the Hazell Opening Brief demonstrated how Measure 47 is legally different from Measure 9, and the State has not responded to most of those differences. Merely making a sweeping assertion is not the same as engaging in legal argument.

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. See the Amicus Brief of Elizabeth Trojan and Fair Elections Oregon (May 14, 2008).

The State's Brief (pp. 39-47) addresses this by claiming that the harms established in Measure 47's legislative findings of fact are the wrong sort of harms under cases such as ***State v. Stoneman***, 323 Or 536, 920 P2d 535 (1996). We address the nature of the harm later. What the State's Brief disregards is the critical role that the absence of legislative findings of fact played in ***Vannatta***. The absence of such findings enabled ***Vannatta***, 324 Or at 539, to characterize the need for political campaign contribution limits as merely "social debate." Absent legislative findings, the Court disregarded the rationales proffered by the proponents for Measure 9's limits in legal arguments, and instead concluded only "that there is a debate in society over whether and to what extent such contributions indeed cause such a harm."

> [T]he "harm" that legislation aims to avoid must be identifiable from legislation itself, not from social debate and competing studies and opinions.

> Measure 9 does not in itself or in its statutory context identify a harm in the face of which Article I, section 8, rights must give way.

Vannatta, 324 Or at 539.

Measure 47, in contrast, expressly identifies the harm in its extensive findings of fact, which are indeed "part of the legislation itself." The Court in ***Vannatta*** did not require that the identification of harm take place in some section of the statute other than the findings in Section (1). The State's Brief is conflating this issue with the ***Robertson/Stoneman*** rationale on "whether the *actual focus* of the enactment is on an *effect* or *harm* that may be proscribed. ***Stoneman***, 323 Or at 543.

The State's Brief (pp. 47-48) the misstates the case law in Oregon on deference to legislative findings of fact, citing no Oregon cases (but cases from New Hampshire and Florida). The Oregon cases clearly require deference. ***State ex rel. Van Winkle v. Farmers Union Co-op Creamery of Sheridan***, 160 Or 205, 219-220, 84 P2d 471, 476-77 (1938), adopted the reasoning of ***United States v. Carolene Products Co.***, 304 US 144, 58 SCt 778, 82 LEd 1234 (1938), for defining the scope of the judicial role in determining the weight to give legislative findings in considering the constitutionality of an Oregon law. *Accord*, ***Savage v. Martin***, 161 Or 660, 682, 91 P2d 273, 281 (1939); ***Smith v. Washington County***, 241 Or 380, 387, 406 P2d 545, 549 (1965).

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

Vannatta left open the door for limits on political contributions or spending by corporations and unions, as demonstrated in the Brief of Amicus Curiae the Better Government Project (pp. 2-14). As the State is fond of citing ***Meyer v. Bradbury***, we note that even the dicta in that case left open the same door.

> Under Oregon law, both campaign contributions and expenditures are forms of expression protected by that constitutional provision, thus making

> legislatively imposed limitations on individual political campaign contributions and expenditures impermissible. See ***Vannatta v. Keisling***, 324 Or 514, 524, 931 P2d 770 (1997) (so holding).

Meyer v. Bradbury, 341 Or 288, 299, 142 P3d 1031 (2006) (emphasis added).

In sum, Measure 47, §§ (3) and (6), contains severable limitations on political contributions and expenditures by corporations and unions. The State's Brief (p. 48) offers no response, except to repeat its position on § (9)(f).

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

See page 4 et seq. of this brief.

NOTE: The State's Brief's offers no response to the arguments in parts IV.B.2 - IV.B.7 or to IV.B.11 of the Hazell Opening Brief, which remain valid:

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

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

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

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

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.

8. THE MEASURE 47 LIMITS ON CAMPAIGN CONTRIBUTIONS AND INDEPENDENT EXPENDITURES ARE NOT RESTRICTIONS ON EXPRESSION OR THE CONTENT OF SPEECH.

The message conveyed by a political contribution is presumably "I support Joe Blow for public office," although § (1)(g) documents that 40% of the money contributed to legislative leadership committee4s came from donors who contributed to both major parties (indicating the contributions are intended to buy influence and not merely express support). The Measure 47 limits on contributions do not prevent anyone from expressing or from hearing this message. Measure 47 allows any individual to make a contribution to any and every candidate for public office, albeit not an unlimited contribution. If making a contribution itself is a "message," Measure 47 does not prevent that message from being expressed or heard, because it allows every individual to make a contribution to any candidate.[8]

The State's position must be that there is a difference in message between making a contribution to a candidate and making an unlimited-size contribution to the candidate. But the State does not identify this difference or why it is protected by Article I, § 8. The only difference we perceive is that the unlimited-size contribution can say, "I have lots of money to influence the outcome of this political race, so this and other candidates and officeholders would be well-advised to pay attention to my desires." The State offers no reason why this message should be protected. As documented in the Brief of Amicus Curiae The Better Government Project (p. 15), in the ongoing case regarding the validity of limits on gifts to public officeholders and candidates, the State argues that this sort of message is tantamount to bribery and is unprotected by Article I, § 8.

---

8. The only prohibitions on contributions in Measure 47 apply to non-individuals and children under the age of 12. See Measure 47 §§ (3)(a), (3)(j), (6)(a), (6)(d).

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

The State's Brief (pp. 40-47) disregards ***State v. Ciancanelli***, 339 Or 282, 296, 121 P3d 613 (2005), and focuses on older cases, such as ***Stoneman***, *supra*. There, the Court upheld a ban on paying "to obtain or view a photograph, motion picture, videotape or other visual reproduction of sexually explicit conduct by a child under 18 years of age." Even though the ban was clearly aimed at expression (the photo or film), the Court upheld the statute as banning an activity which "necessarily involves harm to children" during the production of it. 323 Or at 546.

Here, the harms identified in the legislative findings of fact are also necessarily generated by a system allowing unlimited political campaign contributions. As noted by § (1)(b):

> Because Oregon candidates are now forced to treat campaign fundraising as an "arms race" to be won at all costs, they have become unduly beholden to large contributors and the special interests able to contribute large amounts for their campaigns. Contributions to candidates in contests for statewide public office and for the Oregon Legislature have increased from $4.2 million in 1996 to $27.9 million in 2002. Less than 4% of the contributions were in amounts of $50 or less, and 75% of the money came from only 1% of the contributors.

That these harms are necessarily generated by the "Wild West" system of unlimited mooney is documented throughout the legislative findings of fact.

Measure 47 does not ban contributions by individuals, who remain able to express themselves by contributing amounts in accordance with the Measure 47 limits. The only expression that is limited is that of large contributions. No one has identified what <u>different</u> message is expressed by a large contribution as opposed to one fitting within the Measure 47 limits.

What Measure 47 bans is the disproportionate influence inherent in a system with no limits on political campaign contributions. Further, in ***Stoneman*** the harm to

children was not inherent in the ban on buying photos or film. That ban applied, even if the film of a minor having sex were taken in secret (perhaps by a friend or relative or by one of the participants) and the minor was not solicited to perform the sex act by the photographer or anyone else.[9]

The State's Brief (p. 42-43) then offers circular pronouncements, such as "The harm must instead to be that the legislative power is authorized to restrict or prohibit." The State (p. 43) quotes the discussion of ***Stoneman*** in ***Vannatta***, and we urge examination of the same passage. ***Vannatta*** rejected Measure 9 of 1994 because it "proposes to foreclose certain expression because it works." The same could be said of the expression in ***Stoneman***, where creation of the expression presumably worked to cause harm to children. The current system of unlimited campaign contributions does work--to accord extreme influence to special interests, including corporations, unions, and wealthy individuals, thereby causing government to favor their interests over those for whom large contributions are impossible (as stated in the legislative findings of fact). The statements in ***Vannatta*** are expressly contradicted by Measure 47's findings, which conclude that a system of unlimited political campaign contributions is indeed incompatible with political campaigns in a representative democracy.

The State's Brief (p. 44) then asserts:

> First, although it is true that this court should presume a statute is constitutional, the particular CC&E limits in Measure 47 do not benefit from that presumption because they specifically target protected expression in a manner that has already been held unconstitutional by the Oregon Supreme Court.

This is a mere conclusion based upon no facts or reasoning. Our briefs have presented numerous ways in which Measure 47 differs from Measure 9 of 1994, none of which

---

9. The affirmative defense that the film "did not violate laws prohibiting production of such visual reproductions" would not apply to the secret taping circumstance. ORS 165.540 prohibits secret audio recording of any conversation. Presumably a film of sexual activities would include the conversation of the participants.

the State has addressed. Nor has the State addressed any of the historical evidence which has became available after ***Vannatta*** was decided. Instead, the State offers sweeping, unsupported conclusions.

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

The State's Brief offers no response to the remaining arguments in the Hazell Opening Brief. The State's Brief incorrectly categorizes all of them as "suggesting ***Vannatta*** was wrongly decided" and then disregards them. For example, this argument (about the "incompatibility exception") is based on the existence of the legislative findings in Measure 47, which did not exist in Measure 9 of 1994. It does not suggest that ***Vannatta*** was wrongly decided but instead shows how Measure 47 is not identical to Measure 9 and thus does not warrant an undiscriminating application of ***Vannatta***.

The last argument, that ***Vannatta*** should be reconsidered or reversed, obviously does make the suggestion that ***Vannatta*** was incorrectly decided. The State's Brief (p. 49) reflects a belief that the State is privileged not to respond to such arguments at all:

> Defendants understand that plaintiffs present those arguments to this court for purposes of preserving the issue for subsequent review by the supreme court, but this court is bound by the supreme court's holdings in VanNatta and Meyer.

Plaintiffs present these arguments to have them decided by this Court. That the State has chosen not to respond to them does not lessen their validity or the need for this Court to address them. The State has abandoned its arguments on these issues, thus precluding consideration of them in the appellate process. ***Cato v. Alcoa-Reynolds Metals Co.***, 210 Or App 721, 725, 152 P3d 981, *review denied* 343 Or 115, 162 P3d 988 (2007). Nor is the State privileged to introduce new defenses on appeal. ***Boise Cascade Corp. v. Board of Forestry***, 186 Or App 291, 297, 63 P3d 598, *review denied* 335 Or 578, 74 P3d 112 (2003), *cert denied* 540 US 1075 (2003).

There is no doctrine that prevents litigants from arguing before lower courts for reconsideration or reversal of Oregon Supreme Court decisions. The State's decision not to respond to these arguments does not remove them from consideration by the Court of Appeals. And there may never be substantive review by the Oregon Supreme Court in this case, as review is discretionary.

And the opinion cited by the State, ***Schiffer v. United Grocers, Inc.***, 143 Or App 276, 284, 922 P2d 703 (1996), was itself reversed by the Oregon Supreme Court. ***Schiffer v. United Grocers, Inc.***, 329 Or 86, 989 P2d 10 (1999).

CROSS ANSWERING BRIEF

IV. HORTON PLAINTIFFS AND HAZELL PLAINTIFFS JOINT RESPONSE TO CROSS-ASSIGNMENT OF ERROR BY INTERVENORS.

After some speculation about the mind-set of the drafters of Measure 47, the gist of Intervenors' argument rests upon an hypertechnical definition of "effect" and an unsubstantiated claim of what constitutes valid Constitutional "authority" under the Oregon Constitution, Article I, § 21, which provides:

> No ex post facto law, or law impairing the obligations of contracts, shall ever be passed, nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution.

Intervenors argue (p. 8) that this section "prohibits making the effectiveness of a law dependent on a change in the interpretation *or* terms of the constitution." Contrary to this assertion, duly enacted Oregon laws may, have, and do remain dormant *without taking operative effect* pending constitutional change. The valid authority of the (1) *courts* evaluating prior case law on constitutional interpretation applied to Measure 47's terms, or (2) *voters* approving amendment to the Oregon Constitution, cannot seriously be questioned.

Intervenors' principal argument ignores the plain meaning of the phrase "[no law shall] be passed, the taking effect of which shall depend on * * * authority [not] provided by this Constitution." Voter-initiated constitutional amendments and legislatively-referred constitutional amendments are sources of authority for enactment of laws as provided by the Oregon Constitution, and any duly enacted law may properly delay the operational effect of a statute pending duly authorized change to the Oregon Constitution or pending judicial evaluation of the constitutionality of the statute. The judiciary's constitutional role in declaring "what the law is" and in

providing judicial review are obviously judicial functions under Article III, § 1, and hence cannot usurp legislative functions in violation of Article I, § 21.

A. FRAMEWORK.

The Article I, § 21, jurisprudence interpreting the second independent clause of that section ("nor shall any law be passed * * *") has developed along two lines. The earliest cases considered whether the Legislature had completely exercised its own constitutional authority in enacting a law. ***City of Portland v. Coffey***, 67 Or 507, 135 P 358 (1913). "Completeness" cases stand for the proposition that the legislative body must "fully" exercise all the discretion necessary to "complete" the terms of legislation, and an incomplete exercise of authority fails to satisfy the Article I, § 21, requirement that authority must exercised "as provided for" in the Constitution. This analysis has been superceded and has little remaining vitality.

The modern line of cases frames the Article I, § 21, analysis of "authority" for legislative action differently, centering on whether the legislative body has improperly delegated a quantum of its authority to enact law to some extra-constitutional decision-maker ("proper delegation of authority" cases). Two principles emerge from the proper delegation line of cases.

First, enacting legislation contingent upon the success of a later constitutional amendment put to voters is *not* an improper delegation of "authority," since voters have full legislative authority themselves co-equal with the Legislature. ***Van Winkle v. Fred Meyer, Inc.***, 151 Or 455, 461, 470, (1935), ***Marr v. Fisher et al***., 182 Or 383, 187 P2d 966 (1947) and cases discussed below. The popular vote is a form of legislative authority fully retained by the people in the Oregon Constitution.[10]

---

10. Oregon Constitution, Article IV, § 1:

(continued...)

> In Oregon, the Legislative Assembly and the people, acting through the initiative or referendum processes, share in exercising legislative power. See 127 Or Const, Art IV, §§ 1(1), (2)(a), (3)(a) (vesting in both bodies the power to propose, enact, and reject laws). Respecting the nature of that power, this court previously has explained that
>
> > [p]lenary power in the legislature, for all purposes of civil government, is the rule, and a prohibition to exercise a particular power is an exception. It, therefore, is competent for the legislature to enact any law not forbidden by the constitution or delegated to the federal government or prohibited by the constitution of the United States. ***Jory v. Martin***, 153 Or 278, 285, 56 P2d 1093 (1936).

MacPherson v. Department of Administrative Services, 340 Or 117, 128, 130 P3d 308, 314 (2006).

A subsequent amendment to the Oregon Constitution by either of the recognized processes--by voter initiative or by referral to voters--is a proper exercise of legislative authority under Article I, § 21. ***State v. Hecker***, 109 Or 520, 221 P 808 (1923), concluded that a statute with a dormancy clause somewhat similar to § (9)(f) was suspended from operative effect and hence not in conflict with the existing Oregon Constitution in the time period before the scheduled election on a proposed constitutional amendment. Statutes may properly be passed and remain dormant and unenforceable until the occurrence of an actual exercise of legislative authority, including change in the Oregon Constitution, as set out in greater detail in § IV.D, *post*.

The second point emerging from the modern line of cases is the development of a constitutional basis for the creation of administrative bodies consistent with the terms

---

10.(...continued)

> The legislative authority of the state shall be vested in a legislative assembly, consisting of a Senate and House of Representatives, but the people reserve to themselves power to propose laws and amendments to the Constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly.

of Article I, § 21. It is now accepted law that the Legislature may create administrative bodies and delegate to them the duty of determining the existence of facts upon which the operation of a law may depend in conformance with Article I, § 21 [***City of Portland v. Welch***, 154 Or 286, 303; ***M. & M. Woodworking Co. v. State Industrial Accident Commission***, 176 Or 35, 46; and ***State ex rel. Peterson v. Martin***, 180 Or 459, 473] but "the legislature can not confer upon any person, officer, agency or tribunal the power to determine what the law shall be." ***Van Winkle v. Fred Meyer, Inc.***, *supra.*

While courts do not choose what the terms of a law shall be, they do decide what the terms of law are. Since ***Marbury v. Madison***, 5 US 137, 2 LEd 60 (1803), state and federal courts have agreed with Chief Justice Marshall: "It is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 177. Courts "say what the law is" in the course of deciding contested court cases. Consistent with that judicial power and with separation of powers requirements, the Oregon courts determine with finality the meaning of constitutional provisions, statutory and regulatory enactments, and the common law. Only the court can "describe the law of this state authoritatively." ***Jones v. General Motors Corp.***, 325 Or 404, 416, 939 P2d 608 (1997). See, e.g., ***Automobile Club v. State of Oregon***, 314 Or 479, 487, 840 P2d 674 (1992).

Whether the legislative body has fully expressed its intention ("completeness") to enact a law is logically distinct from an inquiry into whether it has improperly (but nonetheless "completely") delegated some law-making function to an extra-constitutional decision-maker.[11] Intervenors cherry-pick *dicta* from both the

---

11. Contrary to the early "completeness" cases, case law is now well settled that the Legislature has the all-inclusive power to distribute some of the functions and powers of governance. The Legislature can proscribe in detail the structure,

(continued...)

completeness and improper delegation of authority line of cases, thus misstating the overall legal framework. Most tellingly, Intervenors have not identified any incomplete expression of intent in Measure 47 nor any law-making that § (9)(f) assigns to a non-legislative body and thus fail to show a violation of Article I, § 21, under any analysis.

B. OREGON COURTS ROUTINELY REVIEW CASE LAW INTERPRETING THE CONSTITUTION.

We now turn to Intervenors' first argument (p. 8), which is that § (9)(f) impermissibly depends upon "reinterpretation of the Constitution," which will somehow be an exercise of "legislative authority," in violation of Article I, § 21.

Oregon courts do not "reinterpret" the Constitution, although they routinely construe it and on some occasions reverse case law which has construed the Constitution. Section (9)(f) certainly contemplates that courts will continue to exercise this judicial role. What Plaintiffs-Appellants seek is that courts interpret Measure 47 and its terms and findings (which differ from earlier campaign finance laws) in light of what they believe is the proper constitutional analysis. In doing so, a court may find the facts and circumstances sufficiently different from prior cases so that part or all of Measure 47 may currently operate. This requires interpretation of the case and facts at hand, not a hypothetical "reinterpretation" of the Constitution.

Or a court may indeed reconsider prior case law and find its historical analysis had been wanting. In such an event, a case is reversed, but the Constitution remains the same. It is simply construed in light of new information leading to a better

---

11.(...continued)
operations, distribution of functions and powers of local governments under Oregon Constitution, Article IV, S 1, set out in the preceding footnote. See, R. Pulvers, *Separation of Powers under the Oregon Constitution: A User's Guide*, 75 OREGON LAW REVIEW 443, 452-53 (1996).

understanding of what it has always meant. ***Stranahan v. Fred Meyer***, 331 Or 38, 54, 11 P3d 228 (2000).

> [W]e remain willing to reconsider a previous ruling under the Oregon Constitution whenever a party presents to us a principled argument suggesting that, in an earlier decision, this court wrongly considered or wrongly decided the issue in question. We will give particular attention to arguments that either present new information as to the meaning of the constitutional provision at issue * * *.

Stranahan, *supra*, 331 Or at 54, 11 P3d 228.

In the course of stating what the law "is," the Oregon Supreme Court occasionally overrules earlier cases interpreting the Oregon Constitution. In ***Yancy v. Shatzer***, 337 Or 345, 363, 97 P3d 1161 (2004), for example, it held that cases which had found jurisdiction to decide moot cases under the theory that they were "capable of repetition, yet evading review" were wrongly decided under Article VII. ***Stranahan*** overruled ***Lloyd Corporation v. Whiffen***, 315 Or 500, 849 P2d 446 (1993) (***Whiffen II***), declaring its prior interpretation of Article IV, § 1, of the Oregon Constitution allowing initiative signature gathering on retailer's property improvidently decided. When a case involving Constitutional interpretation is reversed, many state or local laws may become invalid. But by interpreting the Constitution the court does not engage in improper "law-making" or any "law-making" at all.

C. JUDICIAL STATEMENTS OF WHAT THE LAW IS DO NOT CONFLICT WITH OREGON CONSTITUTION ARTICLE I, § 21.

City of Portland v. Coffey, 67 Or 507, 135 P 358 (1913), is cited by Intervenors (pp. 8-9) for the proposition that making a statute "dependent" upon judicial interpretation violates Article I, § 21. This seriously misstates the holding of the case. ***Coffey*** is an early (and now-vitiated) case in the completeness line of cases. In ***Coffey***, the primary issue was the legality of a 1913 voter registration statute which was meant to repeal an 1899 statute. The challenged provision of the new statute was

unusually phrased with distinct and incompatible alternatives. The two versions were mutually exclusive.

Intervenors (p. 9) quote the following *dicta* from ***Coffey*:**

> [When] the validity of the enactment is to depend on a decision of the Supreme Court[, [t]his is in effect combining independent departments of the state government which the organic law declares shall be kept separate[.]

67 Or 507. Intervenors omit the next line of text, which supplies the supposed legal basis for this comment, which is Oregon Constitution, Article III, § 1 (*id.*), and not Article I, § 21.

No subsequent case has ever relied upon ***Coffey*** for this *dicta* about the judiciary or for any interpretation of Article I, § 21, applied to judicial authority. Obviously, courts have the power to declare statutes unconstitutional, so ***Coffey*** cannot stand for the sweeping meaning Intervenors urge. ***Coffey*** has been cited in the past for its proposition about statutory construction of legislative intent when a repealing act fails, but never relied upon for its suggestion about separation of powers.

The actual holding in ***Coffee*** relies on the "completeness" doctrine applied to the Legislature's unconstitutional conduct, not the court's. "Chapter 323 of the Laws of Oregon 1913 was not complete when it left the legislative assembly." *Id.* Therefore, the holding is not that a court determining constitutionality of a statute violates either

the doctrine of separation of powers inherent in Article III, § 1,[12] or is an extra-legislative authority contravening Article I, § 21.

While the modern understanding of constitutional jurisprudence would not likely include *dicta* susceptible to the interpretation that a court interpreting the law might be exercising "legislative" authority, the holding stands for the rule that, when the language of a statute is expressed incompletely it fails Article IV, § 21. But this narrow concept of "completeness" has been abandoned by the courts. The Intervenors cite (p. 9) to ***Eckles v. State***, 306 Or 380, 760 P2d 846 (1988), possibly because it references ***Coffey***. However, that reference reveals that ***Coffey*** has been abrogated.

Eckles appears to be the first reported case to arise since ***Coffey*** where the Legislature passed two mutually exclusive terms in case the first term was struck down as unconstitutional. The "Transfer Act," authorized the State Treasurer to transfer $81 million from the State Industrial Accident Fund (SAIF) to the General Fund ("SAIF bailout"). Like the voter registration statute in ***Coffey***, the legislature included a "spare" provision, an entirely different source of revenue to generate $81 million (an employer tax), to take effect only if the transfer from the General Fund was declared unconstitutional. The Court upheld the transfer from the General Fund and never considered whether there was inherent invalidity in enacting a "spare" provision.

---

12. The doctrine of separation of powers prohibits the judiciary from encroaching upon or interfering with the proper exercise of the legislative function. "A law that is too vague for reasonable adjudication * * * lends itself to an unconstitutional delegation of legislative power to the judge and jury." ***State v. Hodges***, 254 Or 21, 27, 457 P2d 491 (1969). Respect for separation of powers is the basis for such rules of statutory construction as "When a properly enacted statute is plain and unambiguous, a court may not interpret it but must enforce it as written." ***Fullerton v. Lamm***, 177 Or 655, 163 P2d 941, 165 P2d 63 (1946). Even in equity a court cannot "amend" the terms of a statute because it operates unfairly in a particular instance. ***Bechtel v. State Tax Com***., 228 Or 123, 363 P2d 1102 (1961).

The ***Eckles*** opinion notes that the form of the legislation, enacting a substituted revenue stream effective only if a court invalidated the transfer from the General Fund, was unusual, citing ***Coffey***. 306 Or at 383 n3. However, if ***Coffey*** were controlling, it would have required more than a "mention." If ***Coffey*** meant that passing a law with a "back-up" provision (in case the Court invalidated a term) is an "incomplete" legislative expression under Article I, § 21, or violated separation of powers by giving the Court a role in choosing the terms of a law, then the ***Eckles*** Court would have been compelled to strike down the enactment which contained both alternatives. Obviously, it did not do so, rendering the last remnant of ***Coffey*** a historical footnote.

Thus, ***Coffey*** has not been extended. The modern body of administrative law has quietly undermined other aspects of the separation of powers concern expressed in ***Coffey***, but that need not be discussed here, since ***Coffey*** is not germane to § 9(f).[13] It does not appear to be good law in its analysis or holding. Neither the *dicta* nor the holding apply to a lawfully enacted statute which is contingent for its operative effect upon a future event.

D. OREGON LAWS MAY REMAIN CONTINGENT PENDING CHANGE IN THE TERMS OF THE OREGON CONSTITUTION.

Intervenors (beginning at p. 9) argue that a statute cannot "depend" upon a future Constitutional amendment. This is not the law. The ***Hecker*** line of cases deals

---

13. Further undermining ***Coffey*** is the established legislative practice of passing several versions of a "self-repealing" time-limited statute. The first version takes effect and remains law until a date certain and is then replaced by another statute which was passed at the same session but has remained dormant until the triggering date. No one has challenged this formulation of passing alternative versions of the same law, some of which remain suspended, as "incomplete" present law-making. See, for example, current legislative efforts to raise the tort claim limits, with higher limits to go into effect at a future date and the currently codified statutes set out in part IV.E of this brief.

directly and conclusively with this precise issue. A statute may remain dormant pending legislative authority exercised by the voters.

The earliest case arose a decade earlier with ***Libby v. Olcott***, 66 Or 124, 132, 134 P 13 (1913). The 1913 Legislature had passed a number of laws and authorized a special election for November 1913, should a referendum be taken on those law. Plaintiff Libby objected, as do Intervenors here, that the lawmakers had violated Article I, § 21, by making the effectiveness of a statute depend upon future action by voters. Focusing on the term "authority" in Article I, § 21, the Oregon Supreme Court held, "Neither this law, nor its taking effect, is made to depend in this instance upon anything except constitutional authority." *Id.* Since voter referenda is a Constitutional power, the procedure did not violate Article I, § 21.

As noted in the State's Answering Brief, ***Hecker*** was a criminal case, and the defendant challenged Oregon's death-penalty statutes. In 1914, voters adopted a constitutional amendment abolishing the death penalty. In the next legislative session, all death penalty statutes were formally repealed. See ***Hecker***, 109 Or at 532-35. The 1920 session of the Legislature (sessions were held in even-numbered years at the time) sought to reinstate the death penalty. That Legislature (1) enacted statutes for implementing the death penalty (Oregon Laws 1920, Chapter 20), with a dormancy clause, and (2) referred a constitutional amendment authorizing the death penalty to be voted upon at a special election called for May 21, 1920. By operation of law, the statutes become effective 90 days after the legislative session ended (Oregon Constitution, Article IV, § 28) and before the May 21 vote.[14]

The dormancy clause stated: "This act shall take effect as soon as and whenever [the Oregon Constitution] will permit." ***Hecker***, 109 Or at 539. The defendant argued

---

14. The Legislative session in 1920 lasted about 30 days, concluding in early February, more than 90 prior to the May 21 election.

that the dormancy clause was invalid as an attempt to alter the statute's constitutionally mandated effective date, which had occurred prior to the scheduled election. The Court construed "shall take effect," as used in Chapter 20, to "merely mean[] that the active operation of Chapter 20, is postponed until the adoption of the 1920 amendment to the Constitution." ***Hecker***, 109 Or at 546.

Further, despite the fact that the statutes had become effective by operation of law, the Court found that they had been suspended from active operation while in conflict with the existing Constitution and hence were not void for being unconstitutional at the time they took "effect." The Court concluded that the purpose of the dormancy clause was to "make the statute operative contemporaneously with but not before the amendment of the Constitution. It is our view that Chapter 20 is constitutional." ***Hecker***, 109 Or at 547.

The Legislature could properly avoid constitutional conflict by suspending the statute's effectiveness awaiting the contingency--the outcome of the vote on the constitutional amendment.

> If the question of conflict is to be determined by the possibility of the statute running counter to the Constitution, then there is no conflict between Chapter 20 and the Constitution; because the operation of Chapter 20 was by its own restraining language absolutely prevented from operating and hence running counter to the Constitution.

Id. See also, ***State v. Rathie***, 101 Or 339, 199 P 169, 200 P 790 (1921) (statute providing for death penalty for murder in the first degree passed in January 1920 contingent upon outcome of election called for May 20, 1920, on a constitutional amendment re-authorizing death penalty).

Both the need for completeness and the need for proper delegation principles inherent in Article I, § 21, were clearly described again in ***Marr v. Fisher***, *supra*. The Legislature passed certain statutes relating to income tax exemptions (Ch 539) contingent upon voter approval or rejection of a referred Sales Tax Act. Plaintiffs

objected that making the income tax provision contingent upon the outcome of an election violated Article I, § 21. The Oregon Supreme Court explained:

> The purpose of the constitutional provision, Art I, S 21, relied upon by plaintiffs, is to prevent unlawful delegation of legislative authority. The law-making power, under the Constitution of Oregon, Art IV, § 1, is vested in the legislature, but the people have reserved unto themselves the power to initiate law and to approve or reject at the polls any act of the legislative assembly. The people, having thus vested the legislative assembly with the lawmaking power, have in effect said that the legislature cannot confer such power upon any authority, except as provided in the Constitution. It is the constitutional function of the legislature to declare whether there is to be a law; and, if so, what are its terms. ***La Forge v. Ellis***, 175 Or 545, 154 P2d 844; ***Van Winkle v. Meyers***, 151 Or 455, 49 P2d 1140.
>
> While the legislature cannot delegate its power to make a law, it is well settled that it may make a law to become operative on the happening of a certain contingency or future event. 11 AMJUR 926, § 216; 50 AMJUR 516, § 497. The rule is thus clearly stated in 16 CJS, *Constitutional Law*, § 141: "It is a general rule that where an act is clothed with all the forms of law and is complete in and of itself, it is fairly within the scope of the legislative power to prescribe that it shall become operative only on the happening of some specified contingency, contingencies, or succession of contingencies. Such a statute lies dormant until called into active force by the existence of the conditions on which it is intended to operate.

Marr v. Fisher, *supra*, 182 Or at 388-89, 187 P2d at 968-99. The Court explained that an act is "complete" when the Legislature has "exercised its discretion and judgment as to the expediency or inexpediency of the [statute]" and having done so "it had the power to determine the conditions on which such Act should go into operation." *Id.* In the present case, Measure 47 is a complete expression of the voters will on the topics it covers.

Marr continued:

> As said in ***State ex rel. v. Bixler***, 136 Ohio St 263, 25 NE2d 341, 344: "There is a distinction between a legislative declaration that an enactment shall not become a law until approved by some authority other than the General Assembly itself, and a statutory provision which has become law but depends for its execution upon a contingency or an eventuality. The former is prohibited; the latter is not." In this state, laws may be enacted by two methods, viz.: (1) By the legislature; (2) By the people through the exercise of the Initiative. If the Acts in the instant case were incomplete when they came from the legislature, we would agree with appellants that

> they could not be made complete as a result of the referendum vote on the Sales Tax Act. The record, however, does not present that question.
>
> We conclude that the legislature may constitutionally enact a law and make its operation depend upon the contingency of the Sales Tax being, or not being, in effect on and after January 1, 1948.

Marr v. Fisher, *supra*, 182 Or at 392, 187 P2d 970. The present situation is controlled by the ***Marr v. Fisher*** reasoning and holding.

Marr, and the distinction between "completeness" and the legislative power to suspend statues, was explained again in ***Foeller v Housing Authority of Portland***, 198 Or 205, 265, 256 P2d 752, 780 (1953) (using "effect and operation" as synonyms). Plaintiffs challenged the delegation of authority to the Housing Authority to resell property under the Urban Renewal Act. The Supreme Court rejected the challenge, noting the Constitution's requirement that "the act must be complete in itself, must be made law by the legislature and only its effect and operation may be made dependent on the contingency."

> Since the law-making power is entrusted by the Constitution, Art IV, § 1, to the legislature, it is clear that when an act leaves the legislative halls it must be complete and not contemplate that some other department of our government or an agency will complete it. In other words, the legislature cannot delegate the power to determine what the law shall be.
>
> Although the legislature cannot delegate its power to make a law or complete one, it can empower an agency or an official to ascertain the existence of the facts or conditions mentioned in the act upon which the law becomes operative. ***Savage v. Martin***, 161 Or 660, 91 P2d 273, and ***Livesay v. DeArmond***, 131 Or 563, 284 P 166, 68 ALR 422. In the meantime, the statute remains dormant. The above principle was expressed in ***Marr v. Fisher***, 182 Or 383, 187 P2d 966, 968, in the following manner:
>
> > * * * If the Act was complete in the sense that the legislative assembly had exercised its discretion and judgment as to the expediency or inexpediency of the income tax exemption provisions--and we think it did--it had the power to determine the conditions on which such Act should go into operation. Indeed, the Constitution itself, Art I, § 22, expressly confers upon the legislative assembly the right to suspend the operation of laws. If the rule were otherwise, the legislature would indeed be at a great disadvantage in solving many of the complex and difficult problems with which it is confronted.'

We take the following from 16 CJS, *Constitutional Law*, § 141, page 415:

> The legislature must itself fix the condition or event on which the statute is to operate, but it may confide to some suitable agency the fact-finding function as to whether the condition exists, or the power to determine, or the discretion to create, the stated event. The nature of the condition is, broadly, immaterial. Generally, it may consist of the determination of some fact or state of things on the part of the people or a municipality or other body or officers; * * * except that the execution of a statute may not be conditioned on the unbridled discretion of a single individual or an unduly limited group of individuals. * * *
>
> In any case, as a general rule, the enactment of the statute itself may not be made contingent on the action of officers or people; the act must be complete in itself, must be made law by the legislature and only its effect and operation may be made dependent on the contingency.

***Foeller v. Housing Authority of Portland**, supra,* 198 Or at 264-265, 256 P2d at 780.

These rules of constitutional interpretation are consistently applied in other jurisdictions as well. In sum:

> It is the general rule in this country that a legislature has power to enact a statute not authorized by the existing constitution of that State when the statute is passed in anticipation of an amendment to its constitution authorizing it or which provides that it shall take effect upon the adoption of an amendment to its constitution specifically authorizing and validating such statute.

Henson v. Georgia Indus. Realty Co., 220 Ga 857, 862, 142 SE2d 219, 224 (1965).

Courts in other jurisdictions have upheld the practice of suspending statutes pending approval of a related constitutional amendment. In ***yAlabam's Freight Co. v. Hunt***, 29 Ariz 419, 422-23, 242 P 658 (1926) (relying upon ***Hecker***), the court approved the constitutionality of a 1933 workers compensation statute contingent on passage of constitutional amendment referred to voters in the same legislative act and to be voted on in November of the same year. In widely cited cases, ***Re Opinions of Justices***, 227 Ala 291, 149 So 776 (1933) (income tax enabling act contingent upon constitutional amendment) and ***Re Opinions of Justices***, 227 Ala 296, 149 So 781 (1933) (warrant enabling act and constitutional amendment regarding

the state debt), the Alabama Supreme Court held that an enabling act may properly be passed in anticipation of the outcome of a scheduled vote upon a constitutional amendment. See also, ***Henson v. Georgia Indust. Realty Co.***, *supra* (statutes adopted by 1952 Legislature relating to special laws contingent upon outcome of vote upon referral in November 1953 election on constitutional amendment); ***Application of Okla. Indus. Fin. Auth***., 360 P2d 720 (Okla 1961) (July 1959 enabling legislation to create State Industrial Finance Authority contingent upon outcome of July 1960 vote on constitutional amendment referred by same legislative session);

E. "EFFECTIVE DATE" AND "OPERATIVE DATE" ARE INTERCHANGEABLE.

1. EFFECTIVE DATES ARE SET BY THE OREGON CONSTITUTION.

Intervenors argue (pp. 9-10) that § (9)(f) must be construed as an attempt to alter the effective date, not just the operative effect, of Measure 47. Generally, a court applies the same principles of statutory construction to measures passed by the initiative process as it does to all laws. ***Stranahan v. Fred Meyer, Inc.***, 331 Or 38, 61, 11 P3d 228 (2000); ***PGE v. Bureau of Labor and Industries (PGE***), 317 Or 606, 612 n4, 859 P2d 1143 (1993).

Therefore, the first look is to the text and context of the provision to determine the intent of the citizen-legislators, with the text being the best evidence of their intent. ***PGE v. BOLI***, 317 Or at 610. In interpreting the text, a court considers statutory and judicially developed rules of construction "that bear directly on how to read the text," such as "not to insert what has been omitted, or to omit what has been inserted," and to give words of common usage their plain, natural and ordinary meaning. *Id*. at 611; ORS 174.010.

Oregon Constitution, Article IV, § 1(4)(d) establishes when voter-approved measures become effective (30 days from voter approval). A close look at the text of § (9)(f) belies the assertion it seeks to avoid or replace the ordinary effective date: "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 * * *." The first prepositional phrase in § (9)(f) clearly references this effective-by-operation-of-law and makes no effort to change that effective date as set by application of the Constitution.

In fact, the § (9)(f) clearly acknowledges the fact that existing law will control "the effective date," as it states "*this Act shall nevertheless be codified.*" "Codification" is "[t]he process of collecting and arranging systematically, usually by subject, the laws of a state or country, or the rules and regulations covering a particular area or subject of law or practice[.]" BLACK'S LAW DICTIONARY 258 (6th ed 1990). Thus, the instruction to "codify" presumes the Act has become "the law" on its effective date. Regardless of formal effective date and codification, § (9)(f) by its own terms does not take operational effect. To read any other meaning makes the whole sentence meaningless, something along the lines of, "On the date this Act becomes effective, it shall become effective later."

2. THE MEANING OF "EFFECT" IS ESTABLISHED IN OREGON LAW.

Intervenors (p. 9) argue that Appellants rely on a meaning for "effect" which was understood "80 years ago."[15] There follows a speculative analysis that the Oregon Supreme Court has implicitly recognized that certain cases had been improvidently

---

15. Intervenors are happy to rely on ***Coffey***, decided 96 years ago, but apparently draw the line against relying on consistent word usage which has remained constant for 80 years.

decided, but mind-reading is not helpful to our analysis and more recent cases--***Davis v. Van Winkle***, 130 Or 304, 307, 278 P 91, 92, 280 P 495 (1929) and ***Portland Pendleton Motor Transp. Co. v. Heltzel***, 197 Or 644, 656-7, 255 P2d 124, 129 (1953)--continue to find that "effective" and "operative" are interchangeable.

In any event, Plaintiffs and Intervenors apparently are in agreement that the ***Hecker*** case supports Plaintiffs' position. Intervenors must then argue that it is nonetheless "too old" to remain good law (p. 12). But ***Hecker*** is directly on point and the meaning it ascribes to "take effect" has consistently been applied to construction of voter-initiated measures each time the question has arisen.

Let's review ***Hecker***. As discussed at pp. 17 and 23, *ante*, that dormancy clause stated: "This act shall take effect as soon as and whenever [the Oregon Constitution] will permit." ***Hecker***, 109 Or at 539. The Court heard the argument that this phrasing was a invalid attempt to alter the Act's constitutionally mandated effective date. Intervenors make the same argument here. In ***Hecker*** their argument was rejected. The Court held "shall take effect," to "merely mean[] that the active operation of Chapter 20,is postponed until the adoption of the 1920 amendment to the Constitution." ***Hecker***, 109 Or at 546.

Thirty years after ***Hecker*** was decided, in construing another voter passed measure, Article IV, § 1, of the Constitution, the Oregon Supreme Court held:

> It is obvious that the word 'operative' and the words 'take effect and become the law' were used synonymously and interchangeably.

Portland Pendleton Motor Transp. Co. v. Heltzel, *supra*. The Court noted:

> [I]n ***Davis v. Van Winkle***, ***Sears v. Multnomah County***, [49 Or 42, 45, 88 P 522, 523, (1907)], and ***Kadderly v. Portland***, [44 Or 118, 147, 74 P 710, 720, 75 P 222 (1904)], we used the words 'take effect and become the law' interchangeably with the word 'operative.'

Since explicit holdings in Oregon case law all support the Plaintiffs that "effect" and "operate" as synonyms, Intervenors would have us believe that after ***Hecker*** was

decided (1923) the Legislative Drafting Manual has *sub silentio* created different meanings for "effect" and "operation" so that ***Hecker*** is no longer good law (p. 15). By implication ***Portland Pendleton Motor Transp. Co. v. Heltzel***, decided in 1953, and the line of cases it relied upon, are now also bad law, in conflict with a future style manual published by an office of the Legislature but never adopted as law.

Yet the foregoing cases were the Oregon case law guidance available to the drafters of Measure 47 as to the wording necessary to accomplish the purpose of preserving Measure 47 for future implementation, should Measure 46 fail. In these cases, the words used to describe the future emergence from dormancy were "effective" or "take effect"; it was not the word "operative." What Intervenors argue is that the drafters of Measure 47 should have disregarded all of the applicable case law and should instead have consulted the Legislative Drafting Manual prepared decades later by Legislative Counsel. (As pointed out below, Legislative Counsel routinely uses the terms "effective" and "operate" interchangeably.)

3. "EFFECTIVE" AND "OPERATIVE" ARE USED INTERCHANGEABLY BY LEGISLATIVE COUNSEL.

In construing the words of § (9)(f), words are to be given their common meanings. ***State v. Cornell/Pinnell***, 304 Or 27, 31, 741 P2d 501 (1987); ***PGE v. BOLI***, *supra*. This basic rule is not countermanded by the Legislative Drafting Manual. A drafting manual may announce elements of style but is not a controlling mandate upon citizens drafting initiatives nor a directive to the courts on how to construe voter initiatives or any law. The Oregon Supreme Court has consistently

found "take effect" and "operational effect" to be synonymous--before and after ***Hecker*** was decided.[16]

Moreover, even the Office of Legislative Counsel itself (under the direction of the President of the Oregon Senate and the Speaker of the House) currently chooses the word "effective" to mean "operative" in explaining statutes to the general public in notes to the Oregon Revised Statutes.[17] Consider the Legislative Counsel's

---

16. The Oregon Supreme Court has repeatedly recognized that "effect" and "operate" are commonly interchanged in legal terminology. BLACK'S LAW DICTIONARY (1951 ed) offers the following definition:

> Effect as a noun, illustrated by "the operation of a law, of an agreement, or an act. ***Maize v. State***, 4 Ind 342.
>
> The phrases "take effect," "be in force," "go into operation," *etc*., are used interchangeably, ***Maize v. State***, 4 Ind 342.

The citation to Indiana law for an illustrative usage is of particular importance, as our Supreme Court, from the earliest days, has looked to constitutional decisions on analogous language by state Supreme Courts prior to or contemporaneous with the adoption of our Constitution. ***City of Portland v. Stock***, 2 Or 69, 73, 1863 WL 422, *2 (1863). The ***Maize*** opinion, construing a section of the Indiana Constitution setting out the "operation of laws" (an early analog to Oregon's Article I, § 21), states:

> Let us inquire whether the taking effect of the act of March, 1853, in whole or part, is made to depend upon any authority unknown to the constitution.
>
> The words "take effect," "be in force," "go into operation," &c., have been used interchangeably ever since the organization of the state. The "operation of the laws," as used in the 20th sec., art. 1, seems to be their taking effect and continuing in force.

Maize v. State, 4 Ind 342, 1853 WL 3340 *5 (1853). See ***Foeller v. Housing Authority of Portland***, *supra,* 198 Or at 265, 256 P2d at 780 (using "effect and operation" as synonyms).

17. ORS 171.275(1) provides:

> (1) Each biennium, the Legislative Counsel, under the direction of the Legislative Counsel Committee, shall publish and distribute the Oregon Revised Statues, including and index and annotations.

(continued...)

explanations in the current codified provisions of Oregon Law which follow. As statutory enactments, all of the described provisions of law have long since become "effective" by operation of law. Nonetheless, in explaining the suspended status of various laws to the general public, Legislative Counsel consistently uses "effective" to mean "operative," as in "effective upon further legislative action," "this version effective 01-91-2014," and "contingently effective."[18]

On the siting of correctional facilities:

ORS 421.628. Decisions of Authority binding; public services for construction and operation of facilities. This version of section effective until further legislative authorization. See also following version of this section, effective upon further legislative action.

ORS 421.628. Decisions of Authority binding; public services for construction and operation of facilities (later effective version). This version of section effective upon further legislative authorization.[19] See also preceding version of this section, effective until further legislative authorization.

On uses of SAIF funds:

ORS 656.632. Industrial Accident Fund, sources and uses.
This version of section effective until 01-02-2014. See also following version of this section, effective 01-02-2014.

17.(...continued)

(2) The Legislative Counsel Committee shall establish policies for the revision, clarification, classification, arrangement, codification, annotation, indexing, printing, binding, publication, copyrighting, sale and distribution of the of the publications referenced in subsection (1) of this section.

The Legislative Counsel Committee consists of the Speaker of the House of Representatives, the President of the Senate, and their appointees from each house of the legislature. ORS 173.191.

18. Undersigned's Westlaw search of the Oregon Revised statutes on February 20, 2009, resulted in a list of 33 currently codified statutes with the word "effective" used in sense of operationally effective.

19. The anticipated "legislative action" was contingent upon the issuance of federal permits by the US Environmental Protection Agency.

> ORS 656.632. Industrial Accident Fund, sources and uses (later effective date). This version of section effective 01-02-2014. See also preceding version of this section, effective until 01-02-2014.
>
> **On definitions in Unfair Trade Practices Act**:
>
> ORS 646.605. ORS 646.605 to 646.652; definitions (first version). This version of section effective until 01-02-2012. See also following version of this section, effective 01-02-2012.
>
> ORS 646.605 definitions (second version). This version of section effective 01-02-2012. See also preceding version of this section, effective 01-02-2012.
>
> **On uses of Master Tobacco Settlement funds**:
>
> ORS 323.806. Tobacco product manufacturer requirements (contingently effective version). This version of section contingently effective. See also preceding version of this section, effective 09-24-2003.[20]

In addition, the Legislative Drafting Manual (2006), p. 12.10, itself uses the words "effective" and "operative" interchangeably.

> The effect of an effective date or operative date provision in an Act referred by the Legislative Assembly to the people is explained in ***Portland Pendleton Motor Transp. Co. v. Heltzel***, 197 Or 644, 255 P2d 124 (1953); 29 Op Atty Gen 287 (1959).

Further, the same manual advises legislators on how to word a "conditional referral":

> SECTION __. This (year) Act does not take effect unless the amendment to the Oregon Constitution proposed by _____ Joint Resolution ___ (year) is approved by the people at the next regular general election held throughout this state. This (year) Act takes effect on the effective date of that constitutional amendment.

According to Intervenors, the above section would render the Act unconstitutional and self-immolating, because it states that it does not "take effect" until a future amendment is enacted by voters. Instead, say Intervenors, such a section must say that the Act does not "become operative" until a future amendment is enacted by voters. But even the Legislative Drafting Manual does not follow Intervenors' "rule."

---

20. The contingency arises "31 days after entry of a final judgment that invalidates the amendments to ORS 293.535 by section 21 of this 2003 Act."

While it is true that "language changes over time" as Intervenors argue (p. 13), the phrases "take effect" and "go into operation" remain interchangeable in meaning now and have been widely understood to be interchangeable for centuries and Oregon Revised Statutes repeatedly and consistently uses the word "effective" to advise the public of future dates or contingent events which will make enactments operative.

Intervenors give examples of slang words that have lost meaning over time. This is hardly surprising, as slang is meant to be transient and is used by speakers to separate themselves from formal English.[21] True, language does evolve (as demonstrated in the Horton Plaintiffs' Opening Brief), but there is no evidence that "effect" has become archaic and incomprehensible to the modern voter, as argued by Intervenors (p. 16-17).[22]

---

21. SLANG An ever changing set of COLLOQUIAL words and phrases generally considered distinct from and socially lower than the standard language. Slang is used to establish or reinforce social identity and cohesiveness, especially within a group or with a trend or fashion in society at large. It occurs in all languages, and the existence of a short-lived vocabulary of this sort within a language is probably as old as language itself.

    * * *

    The aim of using slang is seldom the exchange of information. More often, slang serves social purposes: to identify members of a group, to change the level of discourse in the direction of informality, to oppose established authority. Sharing and maintaining a constantly changing slang vocabulary aids group solidarity and serves to include and exclude members. Slang is the linguistic equivalent of fashion and serves much the same purpose. Like stylish clothing and modes of popular entertainment, effective slang must be new, appealing, and able to gain acceptance in a group quickly. Nothing is more damaging to status in the group than using old slang.

    Tom McArthur, CONCISE OXFORD COMPANION TO THE ENGLISH LANGUAGE (Oxford 1998).

22. Intervenors' discussion of slang usage is off the mark. Section (9)(f) uses straightforward standard English in the phrase, "shall become effective," not some transient slang such as "shall rock the statutory world, dude."

Intervenors next suggest (p. 19) that § (9)(f) was drafted by a "contemptuous" Humpty Dumpty, inventing an arbitrary and idiosyncratic meaning to "effective."[23] We are not in Wonderland or in a Looking-Glass world with no logic or norms. In the real world, "operation" and "effect" have had synonymous meanings and usage in standard English for centuries and continue to have such synonymous meaning now.

WEBSTER'S REVISED UNABRIDGED DICTIONARY (1913), defines:

> Effective a. Having the power to produce an effect or effects; producing a decided or decisive effect; efficient; serviceable; operative; as, an effective force, remedy, speech; the effective men in a regiment.
>
> Effect, n.
>
> 1. Execution; performance; realization; operation; as, the law goes into effect in May.

"Operation" is defined:

> 3. That which is operated or accomplished; an effect brought about in accordance with a definite plan; as, military or naval operations.

MIRIAM-WEBSTER ONLINE DICTIONARY[24] (February 23, 2009):

> Effect n.
>
> * * *
>
> 8: the quality or state of being operative: operation <the law goes into effect next week>
>
> Effective adjective
>
> * * *
>
> 4: being in effect: operative <the tax becomes effective next year>
>
> Operative adjective

---

23. In context, Alice had stated, "I don't know what you mean by 'glory.'" Humpty Dumpty smiled contemptuously, "Of course you don't--till I tell you. I meant 'there's a nice knock-down argument for you!'"

24. http://www.merriam-webster.com/dictionary.

1a: producing an appropriate effect

It should be clear from the actual text and the common meaning of the words that the drafters of § 9(f) intended and voters understood that "shall become effective" means "shall have operational effect."

4. INTERVENORS CITE SPURIOUS HISTORICAL SOURCES.

As noted in our Reply to Defendant, once a court recognizes the need for historical information it should consider the proffered sources for authenticity, veracity, bias, and other indicia of historical integrity. While the courts do look to other sources for "context" if the text under consideration is not clear, they do so sparingly and with caution. In this case, those other sources of information (the ballot title, explanatory statement, even Voter Pamphlet statements, and extrinsic commentary should be evaluated for (1) objectivity and (2) proof that voters were exposed to such materials.

The ***Stranahan*** Court looked in vain for "objective materials circulated to the public at large before the adoption of the initiative and referendum provisions of Article IV, section 1, that assist our interpretation of that provision," 331 Or 38, 65, 11 P3d 228. The decision thus approved the cautious approach earlier advanced in dissent by Justice Durham in ***Deras v. Myers***, 327 Or 472, 482, 962 P2d 692 (1998) for resort to extrinsic materials.

> [P]aid written arguments for and against a measure in the voters' pamphlet and pre-election news and editorial treatment of a measure in the media may reflect only partisan viewpoints and, if so, will shed little or no light on the voters' intention in approving a measure. Similarly, the court cannot assume that all ballot titles and explanatory statements are free of partisan manipulation. Those sources properly may serve as legislative history that clarifies the meaning of ambiguous text in a measure only if they disclose the voters' intention in voting to approve the measure. Whether they meet that standard requires analysis on a case-by-case basis.

Thus ***Stranahan*** and the ***Deras*** dissent caution against use of partisan materials such as those reviewed in ***Ecumenical Ministries v. Oregon State Lottery Comm***., 318 Or 551, 560 n8, 871 P2d 106 (1994) (cited by Intervenors at p. 16).[25]

Anyone can put anything in the Voters' Pamphlet upon payment of $500 for 325 words. Indeed, some opponents have adopted the practice of placing their arguments in the "in favor" section.[26] Should the interpretation of a measure, if enacted, have been

---

25. ***Ecumenical Ministries*** based its heavy reliance on extrinsic materials on the analysis employed in ***State v. Wagner***, 305 Or 115, 132-134, 752 P2d 1136 (1988), *cert granted*, *judgment vacated* by ***Wagner v. Oregon***, 492 US 914, 10 SCt 3235, 106 LEd2d 583 (1989).

    Wagner dealt with the proper role of the jury in determining the sentence in a death penalty case. Wagner pled guilty to aggravated murder. The jury was instructed to answer three questions which would determine whether the death penalty would be imposed and to answer "yes" if it was "more likely than not" that Wagner would commit another violent crime. The death penalty was imposed. The sentence was vacated by the United States Supreme Court on the grounds that the probability of re-offending violently in a death penalty determination must be proved "beyond a reasonable doubt."

    In the course of reaching its vacated decision, the Oregon Supreme Court construed whether a person who pled guilty to a capital crime could be subject to the death penalty at all under Article I, § 11, of the Oregon Constitution which (as amended in 1932) allowed a criminal defendant to waive jury trial. It reviewed the ballot title and the single affirmative voters' pamphlet statement for the 1932 constitutional amendment, which was submitted by "a committee appointed by the President of the Senate and the Speaker of the House to prepare this argument. We strongly recommend enactment of this measure" and signed by the sole Senate sponsor of the measure. *Id.* at 133-4. In that particular instance, the proponents' statement was fairly close to traditional legislative history, as it was prepared exclusively by members of the legislature. A statement by the drafters may shed light on the drafters intent, but as Justice Durham points out, paid materials may be subject to "partisan manipulation" and unlikely to illuminate voters' intent.

26. For example, Measure 9 of 2000 proposed to prohibit public school instruction encouraging certain behaviors. Here is its ballot title caption:

    PROHIBITS PUBLIC SCHOOL INSTRUCTION ENCOURAGING, PROMOTING, SANCTIONING HOMOSEXUAL, BISEXUAL BEHAVIORS

(continued...)

influenced by the insertion of an poison-pill "argument in favor" of the measure? How can a court assess the reliability of such material as a basis for interpretation with further collateral investigation into the agenda, funding and "intent" of the purchasers of such statements?

Intervenors then quote from paid Voters Pamphlet statements in opposition to Measure 47 for some point about what voters "understood." These statements, culled from opposition materials, fail the test of being "objective." ***Stranahan***, *supra*, 331 Or at 65. None of the proffered statements has anything to do with the technical drafting point about "effective" versus "operative" which Intervenors seek to make but are dire predictions and phrases which may have done well in focus groups. It's a stretch to divine voters' intent from reading snippets from partisan Voters Pamphlet statements submitted by one of the labor unions (which made over $7.6 million in political contributions to Oregon state and local contests in the 2006 election cycle and would

---

26.(...continued)

Here is a Voters' Pamphlet argument in favor of this Measure 9:

> ARGUMENT IN FAVOR
> AN EXPLANATION: BALLOT MEASURE 9
>
> Amends state statutes to make Lon Mabon's **personal moral beliefs** into **public policy**.
>
> [15 other reasons not to vote for Measure 9 omitted here]
>
> Builds political power for **Lon Mabon**, who's declared himself to be **GOD'S ONLY MESSENGER** (*Sunday Oregonian*, March 10, 1996)!
>
> (This information furnished by M. Dennis Moore, Special Righteousness Committee.)

The full text of this argument is at
http://www.sos.state.or.us/elections/nov72000/guide/mea/m9/9fa.htm

be restricted by Measure 47's ban on union contributions[27]) claiming that Measure 46 not Measure 47 itself) "would take away your right to free speech."

Misstatements about the law in an *Oregonian* editorial cited by Intervenors (p. 18) fail both the tests of objectivity and any proof that some or any voters relied upon it. If such an editorial had evidentiary weight then any and all misinformed letters to the editor or paid advertisement in a newspaper of general circulation could be argued to contradict the plain meaning of an initiative. Further, the *Oregonian* was a staunch opponent of both Measure 46 and Measure 47 and published numerous editorials against them.[28]

The rationale for looking at opposition newspaper editorials and paid Voter Pamphlet statements in the past may have assumed that voters had relatively few media sources of information on measures, so a Court could review a complete universe of extrinsic materials. This was the situation in ***State v. Wagner***, 305 Or 115, 132-134, 752 P2d 1136 (1988) (relied upon by ***Ecumenical Ministries***), where the court construed a constitutional amendment passed in 1932. But there was only one paid statement to review, and it was supplied by members of the Legislature who had referred the measure to voters, as explained in footnote 24, *supra*.

Such a rationale for allowing any consideration of contemporaneous partisan materials no longer exists. In today's environment of unlimited expenditures for paid print and broadcast advertisements, as well as the proliferating media outlets--YouTube channels, web pages, e-mail lists, unfiltered blogs, anonymous flyers--extrinsic sources are corresponding even less reliable and the extent they were considered by voters is

---

27. National Institute on Money in State Politics, http://www.followthemoney.org/database/state_overview.phtml?s=OR&y=2006.

28. Such an opposition editorial was published on October 10, 2006, for example.

pure speculation. There is no basis upon which to claim a particular viral e-mail or newspaper column or statement in opposition illustrates voters' intent.

F. *HECKER*, MARR AND *FOUTS* SUPPORT THE HORTON PLAINTIFFS.

Intervenors (pp. 12-13) extensively discuss ***State v. Hecker***, *supra*, ***Fouts v. Hood River***, 46 Or 492 (1905), and ***Marr***, *supra*, for the proposition that the Oregon courts carefully distinguish between the terms "effective" and "operational" and strike down any statute that uses the term "effective" to mean "operational."

The key problem with Intervenors' argument is that neither of the statutes examined in ***Hecker*** and ***Fouts*** contained the magic word "operational." Instead, the law at issue in ***Hecker*** said "shall take effect," not "shall become operational." It was upheld. The law at issue in ***Fouts*** also said "shall take effect," not "shall become operational." It was upheld against a challenge under Article I, Section 21, the exact provision now asserted by Intervenors.

Indeed, the holding in ***Hecker*** refutes intervenors' position. As discussed above, ***Hecker*** makes clear that § (9)(f)'s use of the term "shall become effective" must be construed to mean "shall become operationally effective." So construed, as in ***Hecker***, § (9)(f) is a permissible legislative statement that Measure 47 becomes operation contemporaneous with the change in the constitution.

The earlier ***Fouts*** holding was a strong foundation for the ***Hecker*** decision and also belongs squarely within the completeness line of cases. In ***Fouts*** (and of course, ***Hecker***), the statute at issue provided that it would "take effect" at an appointed time, depending on a specified contingency. ***Fouts***, 46 Or at 494-95. The Supreme Court explained that "[t]he pivotal and cardinal question here is whether the present legislation has been made by the act itself to take effect that is, to become a law dependent upon" an external contingency. *Id*. at 497. After reviewing pertinent case

law from around the country, the Court concluded that the challenged law, "when enacted, was complete in itself, requiring nothing else to give it validity. It became effective as a law from the time of its enactment." *Id.* at 502-03. The effectiveness provision merely was part of the "enginery of the law" designed to trigger whether the Act would "become operative or not." *Id*. at 503.

Thus, ***Fouts*** and ***Hecker*** arising from the non-delegation and completeness lines of Article I, § 21, jurisprudence, each undermines Intervenors' arguments. In both of those cases, like the present one, the constitutionality of legislation was challenged by an claim that the statute's "effect" was improperly postponed. In both of those cases, the Oregon Supreme Court recognized they statutes did not postpone mandated effective dates and in both cases upheld the challenged contingency language as a permissible exercise in avoiding conflict with an existing constitution at the time of the effective date.

Marr, *supra*, does not support Intervenors. In that case, the statute internally directed its effective date (January 1, 1948) but made its operation contingent upon failure of the vote on the sales tax. Not surprisingly, the Court rejected a challenge that this attempted to alter the effective date of the statute. The effective date was clear but "it is well settled that [the Legislature] may make a law to become operative on the happening of a certain contingency * * *." ***Marr v. Fisher***, *supra*, 182 Or at 389. The same analysis applies with equal force here, see discussion, *ante*. As in ***Hecker***, § (9)(f)'s use of the phrase "shall become effective" should be construed merely to defer the measure's operative effect. So construed, § (9)(f) does not address the measure's legal effective date, which is controlled by the Constitution. As in ***Hecker***, the measure's contingent operative effect saves it from present conflict with the Oregon Constitution.

There is no meaningful distinction between an "effective date" and the "operational date" of a statute, neither in legal decisions nor commonly understood usage (which is relevant to this voter-initiated measure). The words are interchangeable in this context. Regardless of which word is used, the law in Oregon is that the effective/operation of a statute can be suspended until a specific date or validly expressed contingency.

G. SECTION (9)(F) MUST BE SEVERED FROM THE REST OF MEASURE 47.

Even if Section (9)(f) is invalid for the reasons asserted in the Intervenors' Cross-Claim, the defect in a single section cannot invalidate the remainder of the text of Measure 47. As discussed above, if Section (9)(f) is invalid, then Section (11) of Measure 47, the severability clause, must be construed to sever Section (9)(f) from the remainder of Measure 47. Intervenors thus cannot prevail on the cross-claim to invalidate *all* of Measure 47.

Coffey does not stand for a "special" rule of non-severability, if a section of a statute fails for violation of Article I, § 21. The Court instead applied the general rules of statutory construction. It looked to the internal logic of the statute and inferred that the Legislature would not have intended to repeal the then-existing statutes, if had known the new alteratively-expressed provisions would fail. That situation is not remotely similar to the present case. Unlike ***Coffey***, in this case the statute, Measure 47, does not repeal existing law. Therefore, the question of whether some pre-existing law should remain in force is nonexistent.

The only issue of statutory construction is what did voters intend should some section of the enactment be void. The answer to that question need not be "inferred," as it is clearly stated in Measure 47's § (11), the detailed severability clause. It is clearly the intent of the drafters and the understanding of voters that any

unconstitutional section or subsection shall be severed, with all remaining provisions left in place as enacted.

Plaintiffs previously cited ORS 174.040, which provides:

> It shall be considered that it is the legislative intent, in the enactment of any statute, that if any part of the statute is held unconstitutional, the remaining parts shall remain in force unless:
>
> (1) The statute provides otherwise;
>
> (2) The remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the remaining parts would not have been enacted without the unconstitutional part; or
>
> (3) The remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the legislative intent."

Gilbertson et al. v. Culinary Alliance et al., 204 Or 326, 282 P2d 632 (1955), noted that the rules set forth in this statute are substantially the same rules applied by the courts in the absence of a statute, citing ***Fullerton v. Lamm***, 177 Or 655, 696, 163 P2d 941, 165 P2d 63 (1946):

> The general rule is "that a statute may be constitutional in one part and unconstitutional in another part and that if the invalid part is severable from the rest, the portion which is constitutional may stand while that which is unconstitutional is stricken out and rejected." 11 AM JUR, *Constitutional Law*, 834, § 152. ***State v. 1920 Studebaker Touring Car***, 120 Or 254, 271, 251 P 701, 50 ALR 81; ***Standard Lumber Co. v. Pierce***, 112 Or 314, 228 P 812; ***State v. Terwilliger***, 141 Or 372, 384, 385, 11 P2d 552, 16 P2d 651. "The inquiry in all such cases is primarily one of legislative intention," ***Standard Lumber Co. v. Pierce***, *supra*; 11 AM JUR, *id*., 842, § 155.

The Intervenors argument that all of Measure 47 must fall, if one section is void, is simply wrong on the facts and inconsistent with rules of statutory construction. Intervenors conveniently disregard ***Gilliam County v. Department of Environmental Qualify***, 316 Or 99, 849 P2d 500 (1993), *rev'd other grounds*, 511 US 953, 114 SCt 1345, 128 LEd2d 13 (1994) (Commerce Clause), although one of their counsel (Mr. DiLorenzo) argued the cause for petitioner on review Columbia Resource Co., a waste

processor challenging the validity of a statute controlling environmental harm from waste disposal operations.

In ***Gilliam County***, petitioners argued that a new statute violated the same constitutional provision, Article I, § 21, that Intervenors advance here. The statute in ***Gilliam County*** provided that the EQC would establish surcharges on waste disposal, "subject to approval by the Joint Committee on Ways and Means during the legislative sessions or the Emergency Board during the interim between sessions." Defendant DEQ conceded that this approval process was unconstitutional but argued that it was severable from the remainder of the statute. Both the Court of Appeals and the Oregon Supreme Court agreed. The provisions regarding approval by subdivisions of the Legislature were stricken, but the rest of the statute remained effective. The unconstitutional provision was severed, even though the statute at issue did not even contain a severability clause and even though the language stricken was merely a portion of a single section.

> As did the Court of Appeals, we conclude that ORS 459.298 is unconstitutional in two respects. First, as respondent concedes, ORS 459.298 is constitutionally impermissible insofar as it requires approval of EQC's rules by the Emergency Board. Second, the statute is constitutionally impermissible insofar as it requires approval of EQC's rules by the Joint Committee on Ways and Means. As written, ORS 459.298 requires either the Emergency Board (in the interim between legislative sessions) or the Joint Committee on Ways and Means (during sessions of the Legislative Assembly) to approve the rules before they can become legally effective. That requirement gives the Emergency Board or the Joint Committee on Ways and Means the right to veto the rules. But, a veto is a legislative act, and a legislative act by less than a majority vote of each chamber is unconstitutional. . . .
>
> Nevertheless, the statute as a whole need not be invalidated if the portions that have been found constitutionally impermissible are severable from the remainder. The severability of unconstitutional portions of a statute is governed by ORS 174.040, which provides:
>
> > "It shall be considered that it is the legislative intent, in the enactment of any statute, that if any part of the statute is held unconstitutional, the remaining parts shall remain in force unless:

> "(1) The statute provides otherwise;
>
> "(2) The remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the remaining parts would not have been enacted without the unconstitutional part; or
>
> "(3) The remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the legislative intent."

Nothing in the text of ORS 459.298 provides that, if any part of that statute were held to be unconstitutional, the remaining parts should not remain in force. *See* ORS 174.040(1), *supra.*

Neither are the portions of ORS 459.298 relating to the establishment of the surcharge by EQC and to the bases of that surcharge "so essentially and inseparably connected with and dependent upon" the approval portions of the statute that it is apparent, either from the text or from the legislative history of the statute, that the former parts would not have been enacted without the latter. *See* ORS 174.040(2), *supra.* ORS 459.298 is part of a comprehensive statutory scheme of regulating solid waste, which includes many sections authorizing public bodies to impose fees to recover their costs. The overriding purpose of ORS 459.298, as revealed by its text and context, is to permit the establishment and collection of fees.

Gilliam County, 316 Or at 107-09.

This result is consistent with the general rule that, if a statute is constitutional in one part and unconstitutional in another part, the portion which is constitutional will stand. ***Gilbertson et al. v. Culinary Alliance et al.,*** *supra.* Similarly, Section (9)(f), if constitutionally invalid, would be severed from the remainder of Measure 47, particularly in light of its own very strict severability clause, Section (11). The remainder of the statute, Measure 47, would survive, without Section (9)(f) at all, and the courts would proceed to examine the substantive provisions of Measure 47 to determine their constitutional validity. That is what this case is doing.

Finally, Intervenors (p. 21-22) cite ***General Electric Co. v. Wahle***, 302, 333 (1956); ***LaForge v. Ellis***, 175 Or 545, 554 (1945); and ***Van Winkle v. Fred Meyer***, 151 Or 455, 470 (1935), for the proposition that statutes which transgress

Article I, § 21, are void in their entirety. These cases do not announce a rule of complete invalidity when a term in a statute violates Article I, § 21.

In ***Wahle***, ***LaForge***, and ***Van Winkle***, an entire law was found unconstitutional, but these cases do not stand for the proposition that sections of statutes which violate any of Article I, § 21, cannot be severed under ordinary rules of statutory construction. In fact in ***Eckles***, *supra*, 302 Or at 398, the Court struck down some provisions of the Transfer Act for violating Article I, § 21, even though it upheld the transfer provision itself against a § 21 challenge.

Wahle, ***LaForge***, and ***Van Winkle*** are limited to their facts. They (and ***Hines*** in Intervenors' footnote 15) are examples of decisions from the "improper delegation of authority" cases. In each of these cases the statute went beyond delegating fact-finding to delegating the decision of what legal standards to impose, such as setting prices or private-party conduct of business.[29] In each instance the entire scheme was

---

29. In ***Wahle*** the Governor could impose prices under agreements reached with a majority of producers who represented a majority of output in either dollars or volume. In ***LaFarge*** the state board could fix prices for barbers if 70% of licensees agreed. In ***Van Winkle***, the prices for ice cream could be fixed by the dairy producers.

unconstitutional, because it depended upon the actions of the private actors.[30] There was no practical way to sever an offending provision.[31]

> ***Van Winkle v. Fred Meyer, Inc.***, *supra*, and *State ex rel.* ***Bissinger & Co. v. Hines***, 94 Or 607, 186 P 420,[32] are instances in which statutes were held invalid because their execution was conditioned upon the unbridled discretion of trade groups. Those decisions illustrate the principle that the legislature cannot make the effectiveness of one of its enactments depend upon the impulses of anyone.

Foeller v. Housing Authority of Portland. *supra,* 198 Or at 266, 256 P2d at 780.

> The legislature may not delegate to private, nongovernmental entities the authority to determine the applicability of a statute. For example, it is improper to delegate the authority to determine the applicability of a legislative pricing mechanism to a private marketing entity. The private delegation cases are pitched generally on the theme of accountability, but

---

30. The results in ***General Electric Co. v. Wahle***, and ***LaForge v. Ellis***, have been vitiated and undermined by the evolution of state administrative law. The delegations that each of case invalidated would now be upheld, had the body charged with making the decision used contested cases or rulemakings and exercised proper discretion rather than accepting, as binding, the proposals or wishes of the private entities. The Legislature routinely practices incomplete delegation to administrative agencies, manifested when the Legislature uses "'delegative terms,' terms that express incomplete legislative meaning that the agency is authorized to complete." ***Qwest Corp. v. Public Utility Commission***, 205 OrApp 370, 379-380, 135 P3d 321, 326 (2006); see also ***J.R. Simplot Co. v. Dept. of Agriculture***, 340 Or 188, 197, 131 P3d 162 (2006) (if the Legislature granted authority to the agency to complete the meaning of a delegative term, courts defer to the agency's interpretation); ***Coast Security Mortgage Corp. v. Real Estate Agency***, 331 Or 348, 353-54, 15 P3d 29 (2000) (reviewing cases on delegation).

31. Also, in ***Van Winkle*** the Court found that the purpose of the statute was beyond the authority of the Legislature. That is why the offending provision about delegation of authority was not merely severed. Nor was there a practical way to sever the delegation provision, as the entire program was supposed to be devised by the private marketing association.

32. In ***State v. Hines***, 94 Or 607, 186 P 420 (1920), a hide inspection act was held invalid because of a provision exempting Multnomah County from the law so long as a state brand and livestock inspector was maintained at the Union Stock Yard in North Portland. Under a prior law, such inspector was appointed by the Governor at the request of the Cattle and Horse Raisers Association (CHRA), which was required to pay the inspector's compensation. The Court found that whether or not Multnomah County should be exempt from the statute was solely dependent upon the discretion of the CHRA, so the statute was unconstitutional as dependent upon an authority other than provided in the Constitution.

> proceed specifically from the premise that governmental authority must be exercised by a governmental entity.
>
> The private delegation cases should be contrasted with cases of intergovernmental delegation and intragovernmental delegation, where general delegation principles apply. In the case of intergovernmental delegation, the court has upheld legislative delegations to local government bodies in the face of separation of powers challenges, stating that the focus in such cases remains "on the presence or absence of adequate legislative standards and whether the legislative policy has been followed."

R. Pulvers, *Separation of Powers under the Oregon Constitution: A User's Guide*, 75 OREGON LAW REVIEW 443, 452-53 (1996).

The cases Intervenors rely upon stand for the proposition that trade groups of private citizens and corporations cannot be delegated law-making power. They do not stand for any rule that specific unconstitutional terms cannot be severed when possible.

There are no private bodies involved in § (9)(f) in Measure 47. There is a severance clause, § (11), which can operate to sever any unconstitutional term, should one be found.

Dated: April 13, 2009

/s/ Linda K. Williams

LINDA K. WILLIAMS
OSB No. 78425
10266 S.W. Lancaster Road
Portland, OR 97219
503-293-0399 voice
503-245-2772 fax
linda@lindawilliams.net

Attorney for Horton Plaintiffs

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I FILED the original and SERVED the foregoing COMBINED REPLY AND CROSS-ANSWERING BRIEF OF HORTON PLAINTIFFS by eFile this date.

John DiLorenzo
Gregory Chaimov
Davis Wright Tremain LLP
1300 S.W. 5th Avenue #2300
Portland, OR 97201

Rolf Moan
Acting Solicitor General
Cecil Reniche-Smith
Assistant Attorney General
Oregon Department of Justice
1162 Court Street N.E. Suite 400
Salem, OR 97201-4096

And the following were served by e-mail this date:

James Nicita
for Amicus Trojan

Dated: April 13, 2009

/s/ Linda K. Williams
_____
Linda K. Williams