IN THE SUPREME COURT OF THE STATE OF OREGON

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

Plaintiffs-Appellants
Cross-Respondents,
Petitioners on Review,

v.

KATE BROWN, Secretary of State of the State of Oregon; and JOHN R. KROGER, Attorney General of the State of Oregon,
Defendants-Respondents
Cross-Respondents,
Respondents on Review

and

CENTER TO PROTECT FREE SPEECH, INC., an Oregon nonprofit corporation, and FRED VANNATTA,
Intervenors-Respondents
Cross-Appellants,
Respondents on Review.

Court of Appeals A137397

Supreme Court S059245 (Control) S059246

ANSWERING BRIEF ON THE MERITS OF INTERVENOR-RESPONDENTS, CROSS-APPELLANTS AND RESPONDENTS ON REVIEW

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STATEMENT OF THE CASE

A. Introduction

At issue in this case is a flawed measure (2006 Measure 47) adopted by the voters that, by its own terms, does not become effective unless and until the Oregon Constitution is amended or the Oregon Supreme Court determines that it should overrule its fourteen-year-old precedent.

Measure 47 is therefore a law, the "taking effect of which shall be made to depend upon any authority" in violation of Article I, section 21, of the Oregon Constitution, which renders the measure invalid in its entirety.

The Secretary of State determined that section 9(f) of Measure 47 was a delayed operation provision that holds the remainder of the measure in abeyance, possibly forever, as a "spore" capable of becoming operative the moment the conditions precedent in section 9(f) are fulfilled.[1]

Petitioners, for a variety of reasons, contend that Measure 47 is both effective and operational and that the Court's prior decisions should be overruled. This brief will therefore address two major issues:

(a) Whether Measure 47 is invalid in its entirety under Article I, section 21, of the Oregon Constitution; and

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[1] Measure 47 will necessitate changes to many sections of the Oregon Revised Statutes that have been amended many times by the legislature since 2006. This brief will not address the challenges that would be presented if Measure 47 suddenly sprung to life and had to be reconciled with a legislative scheme that is no longer consonant with that which existed in 2006.

(b) Whether this Court should accept petitioners' invitation to reexamine and overrule *Vannatta v. Keisling*, 324 Or 514, 931 P2d 770 (1997) ("*Vannatta I*").

B. Questions Presented on Review and Proposed Rules of Law

The Hazell petitioners and the Horton petitioners have, collectively, presented the Court with five "assignments of error" and eight questions presented on review. ORAP 9.17 does not require identification of assignments of error and Rule 9.17(3)(b) permits respondents on the merits to rephrase questions on review if the respondents are dissatisfied with the presentation of the questions in petitioners' briefs. Intervenor-respondents and cross-appellants ("Intervenors") believe the questions presented on review are better phrased as follows:

1. Is Measure 47 (which, among other things, provides that "this Act * * * shall become effective at the time that the Oregon Constitution is found to allow, or is amended to allow" limits on campaign contributions and expenditures) unconstitutional under Article I, section 21, of the Oregon Constitution and therefore invalid?

Ruling sought:

Because the entire act shall become effective only at such time as the Oregon Constitution is amended or is found to allow limitations on campaign contributions and expenditures, the entire act violates

Article I, section 21, of the constitution, which prohibits laws the taking effect of which is made to depend upon any authority except as provided in the Constitution.

2. Should *Vannatta I* be reconsidered and should the constitutionality of all individual components of Measure 47 be determined under some new standard in this proceeding?

Ruling sought:

Section 9(f) of Measure 47 is ostensibly triggered only after the Oregon Constitution is amended or interpreted to permit heretofore unconstitutional limitations on campaign contributions and expenditures. *Vannatta I, a* fourteen-year-old precedent cited forty-four times by Oregon appellate courts, should not be overruled due to (a) jurisprudential reasons, including the lack of a pleading basis for such a challenge, any record in the circuit court proceedings and any record or discussion in the Court of Appeals, (b) the lack of a case or controversy placing the holding of *Vannatta I* at issue, and (c) petitioners' failure to sustain their burden to show that any historical exception or incompatibility exception applies.

C. Summary of Material Facts

Intervenors do not accept those portions of Hazell petitioners' summary of material facts that proclaim the intention and rationale of the drafters of

Measure 47, what they foresaw and why they drafted section 9(f). It is the intent of the voters who adopted the measure, not the intent of the drafters, that matters in interpreting a measure. *See Ecumenical Ministries v. Oregon State Lottery Comm'n*, 318 Or 551, 559, 871 P2d 106 (1994).

However, Intervenors do agree with Hazell petitioners that no party has challenged the constitutionality of any individual component of Measure 47 other than section 9(f) and that neither the trial court nor the Court of Appeals has addressed the constitutionality of any specific provision of Measure 47 other than section 9(f).

SUMMARY OF ARGUMENT

As noted above, Intervenors advance essentially two arguments. First, Measure 47 is invalid in its entirely and, therefore, there are no other issues herein that require the Court's attention. Second, if the Court instead finds that Measure 47 *can* constitutionally be enforced, the Court should simply affirm the Court of Appeals' decision, without entertaining petitioners' arguments that *Vannatta I* was wrongly decided. Each of these two arguments is addressed in summary fashion immediately below and then more fully in subsequent portions of this brief.

By its terms, Measure 47 "shall become effective" if and when the Oregon Constitution is amended or reinterpreted to allow restrictions on campaign expenditures and contributions. However, Article I, section 21, of the

Oregon Constitution provides that no "law shall be passed, the taking effect of which shall be made to depend upon any authority except as provided in this Constitution." Because the effectiveness of Measure 47 is made to depend upon some future judicial interpretation or constitutional amendment, it violates Article I, section 21, and, like any other law that violates the "taking effect" provision in Article I, section 21, Measure 47 is therefore invalid in its entirety.

In rejecting Intervenors' argument below, the Court of Appeals relied on *State v. Hecker*, 109 Or 520, 221 P 808 (1923), wherein this Court interpreted "take effect" to mean "to become operative." However, even if *Hecker* fairly interpreted the meaning of "take effect" in the context of a 1920 measure, that interpretation does not accurately capture the intent of Oregon voters adopting Measure 47 in 2006. Recent measures submitted to Oregon voters have all carefully distinguished between "effective" and "operative." Indeed, another measure on the very same 2006 ballot as Measure 47 clearly stated that it "becomes operative" upon some future events and differentiated "operative" from "effective." The arguments and other materials available to voters in 2006 all made plain that Measure 47's effectiveness would depend upon a companion constitutional amendment, which ultimately was not adopted.

Moreover, since *Hecker*, the Oregon Assembly has adopted and consistently used very specific rules and phraseology when it intends to postpone the application of a law until the occurrence of some future event.

Legislative drafting protocols require the use of the term "operative" (and not "effective") when a law is to be contingent on some future event. These legislative rules are frequently applied by courts in interpreting legislative acts, and there is no sound reason that the same rules should not apply when the people engage in lawmaking through the initiative process. Indeed, this Court has recently recognized that, when the people use legislative terms of art in the initiative process, such terms should be interpreted to carry the same legislative meaning, even where there is no affirmative signal that the people intended to borrow the specific legislative meaning. *Christ/Tauman v. Myers*, 339 Or 494, 499-501, 123 P3d 271 (2005).

The Court of Appeals' analysis rests on the ultimate finding that "effective" in Measure 47 does not really mean "effective," but rather "operative." Not only is this interpretation unsupported by the measure's text, context and relevant history, it also creates fundamental logical problems that the Measure 47 text cannot resolve because the Court of Appeals' interpretation necessarily means that the entire measure is "inoperative," even the "shall become effective" provision.

Even if Measure 47 is determined to be valid, the resolution of the remaining issues in this appeal does not require, and should not allow, the reexamination of this Court's decision in *Vannatta I*. Under all relevant jurisprudential considerations, this is simply not the appropriate vehicle for the

Court to reconsider its prior precedent or to pronounce and apply some new Article I, section 8, standard, as there is no pleading basis for the constitutional issues, the courts below have not yet considered these important issues, and there is no record on which any constitutional issues can be decided. There is also no real case or controversy through which this Court could reach the constitutional issues raised by petitioners. Should the Court attempt in this appeal to address petitioners' Article I, section 8, arguments (as opposed to waiting for a concrete dispute involving the constitutionality of particular sections of Measure 47 or some other restriction on free expression), it would necessarily be called upon to analyze hypothetical scenarios and render an advisory opinion.

Finally, the doctrine of *stare decisis* strongly counsels against disturbing this Court's long-standing and oft-cited decision in *Vannatta I*. Petitioners fall woefully short of meeting their heavy burden of establishing that *Vannatta I* was wrongly decided. The "new" historical information that petitioners present in this case does not refute or legitimately call into question any portion of the *Vannatta I* analysis. In fact, as discussed herein, all available historical evidence only further confirms the findings and conclusions of *Vannatta I*.

ARGUMENT

A. Measure 47 is invalid under Article I, section 21.

2006 Measure 47 restricts campaign expenditures and contributions, but "Article I, section 8, prohibits laws restricting campaign expenditures and contributions." *Meyer v. Bradbury*, 341 Or 288, 293 n 4, 142 P3d 1031 (2006) (citing *Vannatta I*). The proponents of Measure 47 knew, therefore, that, for the measure to stand, the constitution or its interpretation needed to change. If, upon the adoption of a law, the constitution does not permit the government to enforce or implement that newly effective law, then the people may give force to the law by amending the constitution to expressly validate the measure. *Northern Wasco County People's Util. Dist. v. Wasco Co.*, 210 Or 1, 12, 305 P2d 766 (1957) ("a constitutional provision which from the language used shows expressly or by necessary implication that it was intended to operate retrospectively by validating antecedent unconstitutional legislation, renders valid all such legislation * * * without reenactment by the legislature") (citation omitted).

But the proponents of Measure 47 did not follow that course. They chose instead to defer the measure's effectiveness until such time as the constitution changed. The proponents of Measure 47 proposed a companion constitutional amendment, Measure 46, that would have permitted laws "limit[ing]

contributions and expenditures * * * to influence the outcome of any election,**"** and they told voters that "Measures 46 and 47 must both be passed[.]"[2]

In order to make clear that Measure 47 would be effective at such a time as the Constitution were amended in a way similar to that proposed by Measure 46, § 9(f) of Measure 47 provided:

> "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."

However, the companion measure on the ballot (Measure 46) was rejected by the voters.

Perhaps the proponents were trying to avoid having to craft a future constitutional amendment with language that expressly validated Measure 47. *See, e.g.*, Or Const, Art XI, § 11(7) ("Notwithstanding any other existing or former provision of this Constitution, the following [previously adopted tax laws] are validated * * *."). Perhaps the proponents simply made the political choice that voters would be more likely to vote for Measure 47 if the measure assured voters that future voters or judges would need to change the scope of the constitution before the measure took effect. Whatever the reason, the

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[2] Argument in Favor of Ballot Measure 46 by Irene Saikevych, Avis Adee, Robert Altaras, Gerald Cavanaugh, Michael Dawkins, Marshall Fox, Becky Hale, and Jackson County Citizens for the Public Good (Official Voters' Pamphlet, General Election, Nov. 7, 2006).

measure's proponents, like others before them, offered voters a measure that was constitutionally invalid. *See, e.g., League of Oregon Cities v. State of Oregon*, 334 Or 645, 673-74, 56 P3d 892 (2002) (measure unlawfully adopted because proposed too many amendments).

The following matters are not in dispute:

First, Article I, section 21, of the state constitution prohibits the adoption of a measure that "tak[es] effect," *i.e.* becomes law, upon on a future change to a law or a future change to an interpretation of law. In other words, the legislative power of this state cannot be used to delegate to another decision-maker the decision as to whether a measure is to become law, whether that other decision-maker is a private entity, another branch of government, or a future group of lawmakers. *See, e.g., General Electric Co. v. Wahle*, 207 Or 302, 330, 296 P2d 635 (1956) (Legislative Assembly's adoption of Fair Trade Act violated Article I, section 21, by permitting covered businesses to "say whether or not there shall be a law controlling [a] price"). Whether a measure becomes law is the sole province of the present-day lawmakers—the people or their representatives—who adopt the measure. *See Marr v. Fisher*, 182 Or 383, 388, 187 P2d 966 (1947) ("It is the constitutional function of the legislature to declare whether there is to be a law").

Second, because there are times when lawmakers want a measure to apply only in certain future circumstances, the Legislative Assembly employs

specific terminology to permit that situation. The Bill Drafting Manual that the Legislative Assembly follows, and that is available to drafters of initiatives at www.lc.state.or.us, *requires* the use of the term "operative" instead of "effective" when an Act is made contingent upon a future change, such as a change in the constitution:

> "Enabling legislation prepared at the same time as a constitutional amendment or revision must include a provision in the enabling Act to the effect that if the constitutional amendment or revision is not approved by the people at the election at which it is to be submitted, the enabling Act is not effective. *If the enabling legislation is to be adopted by initiative, the provision should indicate that the enabling legislation does not become "operative" unless the accompanying constitutional amendment or revision is approved by the people (because section 1 (4)(d), Article IV, Oregon Constitution, says that an initiative law becomes effective 30 days after the election at which it is approved).*"

Bill Drafting Manual, p. 17.11 (Office of Legislative Counsel 2006) (emphasis added). [3]

In addition, at the time of the adoption of Measure 47, House Rule 13.01(2) and Senate Rule 13.01(3) required that legislative measures conform

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[3] This Court has relied on the Legislative Assembly's manuals to determine the scope or validity of a measure. *See, e.g., Doyle v. City of Medford*, 347 Or 564, 570-71, 227 P3d 683 (2010) (Form and Style Manual for Legislative Measures); *McIntire v. Forbes*, 322 Or 426, 445, 909 P2d 846 (1996) (same); and *Chapman Bros. Stationery & Office Equip. Co. v. Miles-Hiatt Investments, Inc.*, 282 Or 643, 651 n 4, 580 P2d 540 (1978) (Mason's Manual on Legislative Procedures).

to the Form and Style Manual for Legislative Measures, which draws a careful distinction between "effective" and "operative." To avoid running afoul of Article I, section 21, the Legislative Assembly has prescribed the use of "operative"—not "effective"—when a law's provisions are to come to life upon the happening of a future event. *See* Form and Style Manual for Legislative Measures, p. 32 (2005) (providing example: "If approved by the electors * * * this 1987 Act becomes operative").

Third, when interpreting legislation, a court must give effect to "a deliberate choice of words[.]" *Gen. Elec. Credit Corp. v. Tax Com.*, 231 Or 570, 594, 373 P2d 974 (1962).

Fourth, the outcome of this case depends on the meaning of the phrase "shall become effective" as used in section (9)(f) of Measure 47. In particular, the question is: "does that term refer (unconstitutionally) to the 'law-making power,' or (constitutionally) to provision for the law 'to become operative on the happening of a certain contingency or future event'?" *Hazell v. Brown*, 238 Or App 487, 496, 242 P3d 743 (2010), *rev allowed*, 350 Or 573 (2011).

The Court of Appeals answered the question as follows:

> "[S]ection (9)(f) treats 'codified' and 'shall become effective' as two distinct concepts. The former is to occur *regardless of whether* the Oregon Constitution, as construed in *Vannatta I* 'does not allow limitations on political campaign contributions or expenditures.' Measure 47, § (9)(f). The latter is not to occur *unless or until* the Oregon Constitution 'is found to allow, or is amended to allow, such limitations.' *Id.* Thus,

> given the content and design of section (9)(f), the only plausible construction of that provision is that its 'shall become effective' language pertained not to enactment but, instead, solely to when the measure would become operative."

Id. at 497 (emphasis in original; footnote omitted).

The disagreement in this case is over (1) the Court of Appeals' interpretation of "effective," and (2) the method the Court of Appeals used to arrive at its interpretation. Although the terms "codified" and "effective" may express different concepts, it does not follow from the text, context, or history that the different concept that "effective" expresses is "operative"; "effective" can only mean "effective."

This case presents the threshold question of the method by which courts are to interpret initiative measures. Specifically, when the people use a term of legislative art in the exercise of the legislative power reserved by Article IV, section 1, of the state constitution, does the term carry that legislative meaning? This Court's analysis in *Christ/Tauman v. Myers*, 339 Or 494, 499, 123 P3d 271 (2005), suggests that the answer is yes. In *Christ/Tauman*, this Court looked to the use of a term by the Legislative Assembly in laws for the making of laws to determine the meaning of a term used in an initiative measure, *i.e.* "the specific legislative recognition in ORS chapter 250 of the meaning of 'Act' as something different from a constitutional amendment." *Id.* at 500-01. The recognition of "a special and well-recognized meaning in the area of

lawmaking" was key to this Court's decision despite the fact that the measure under review did not include a signal that the people intended to use the term as the Legislative Assembly did in lawmaking. *Id.* at 498. The lesson of *Christ/Tauman* is, therefore, that the context in which an initiative measure arises—and by which the courts are to interpret the measure—*necessarily* includes the use of the term as used in lawmaking even though the initiative measure itself does not contain a signal that the people intended for the term to be read in that specific legislative way.

In this case the Court of Appeals found no signal that the people intended to use the term "effective" in its "specific legislative" meaning:

> "[N]othing in the text, context, or history of section (9)(f) indicates that voters were aware of the specialized meaning given to 'effective' by the Oregon legislature—much less that they intended "effective," as it is used in section (9)(f), to connote such a narrow, particularized meaning."

Hazell, 238 Or App at 497 n 5.

From this truncated inquiry, the Court of Appeals concluded that the only plausible reading of "effective" was that the term carried the meaning of a different term of lawmaking art: "operative." *Id.* at 497. In doing so, the Court of Appeals reached a conclusion diametrically opposed to the result that should obtain here and in other cases in which a measure, whether adopted by the people or the Legislative Assembly, uses a term of lawmaking art.

Interpreting "effective" to mean "operative" has two significant structural problems for the constitution and the state's lawmaking processes. First, the Court of Appeals' interpretation makes elastic the process of making laws, the process most in need of certainty and consistency because of the importance to the integrity and legitimacy of governance. If a term can have two meanings in the same context, then lawmaking becomes the province of the interpretive branch of government—the judicial department—not the legislative department.

Interpreting "effective" to mean "operative" also has the practical effect of essentially writing this provision of Article I, section 21, out of the constitution. If the Court of Appeals' interpretation stands, then any law, however phrased, will almost never run afoul of the prohibition on taking effect upon the action of a future decision-maker. If even the term "effective" does not mean "effective," then it stands to reason that no other term will ever mean "effective," and the courts will just simply interpret their way around the prohibition against "taking effect" upon the act of a future decision-maker.

As *Christ/Tauman* suggests, evidence of the people's conscious "aware[ness]" of existing law is not required for the existing law to serve as the context in which the people adopted a law. Presumably, this is because "everyone * * * is presumed to know the law." *In re Dugger*, 334 Or 602, 622, 54 P3d 595 (2002). Thus, the Court of Appeals failed to credit an essential

aspect of the context in which Measure 47 arose: the terminology used by the people's elected representatives in lawmaking. That terminology, properly credited as the context in which Measure 47 arose, shows that a lawmaker is to use the term "operative"—not the constitutionally prohibited term "effect[ive]"— to postpone the application of a law.

Intervenors acknowledge that, to save a law that was to "take effect" upon the action of a future group of lawmakers, this Court at one time interpreted to "take effect" to mean to "become operative." In *State v. Hecker*, 109 Or 520, 546, 221 P 808 (1923), this Court said:

> "It is true that section 4 of chapter 20, Laws 1920, uses these words: 'Shall take effect'; but for the purpose of this case we shall assume that the language of section 4, chapter 20, is not used in the sense in which like language is employed in article 4, section 28, of the Constitution, and we shall also assume that section 4 of chapter 20 merely means that the active operation of chapter 20 is postponed until the adoption of the 1920 amendment to the Constitution."

Hecker might matter, if the language of lawmaking had stayed static, but lawmaking language, like everyday parlance, changes over time. In the 1920s, a "bimbo" meant a tough guy and eyeglasses were "cheaters"; neither of those terms bears the same meaning today.[4] And, just as the vocabulary of Scott

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[4] For these (and many other changes) in the meaning of words from the 1920s to today, *see* http://www.fcps.edu/westspringfieldhs/academic/english/1project/99gg/99gg4/language.htm and http://local.aaca.org/bntc/slang/slang.htm.

Turow differs from the vocabulary of Scott Fitzgerald, the vocabulary of legislative measures is different now than it was generations ago. Since *Hecker*, legislation has carefully distinguished between a measure's becoming "effective" and a measure's becoming "operative."

For example, this Court's opinion in *Marr v. Fisher* demonstrates how the legislature, by using the prescribed terminology, leaves the provisions of a law dormant pending future action without violating Article I, section 21. 182 Or 383, 389, 187 P2d 966 (1947). In *Marr*, the Legislative Assembly had passed a tax law that provided different exemptions and credits depending upon whether the people adopted or rejected a measure that would create a sales tax. *Id*. at 385-86. Opponents challenged the tax law under Article I, section 21, contending that the contingency of a future vote rendered the tax law invalid. *Id*. at 386-87. This Court upheld the tax law because, to avoid making the effectiveness of the tax law dependent on the later measure, the Legislative Assembly expressly made the tax law *effective* as the constitution prescribed (90 days after adjournment as prescribed by Article IV, section 28), but made the *operation* of the law dependent on the outcome of the vote on the subsequent measure. *Id*. at 389-93. Oregon Laws 1947, chapter 536, section 7 reads: "this act shall not become *operative* * * * if * * * [the other] act * * * has become *effective and operative*." *Id*. at 386 (emphasis added). By using

both "effective" and "operative" together, the Legislative Assembly demonstrated that the two terms have different meanings.

This Court explained this pivotal distinction between *effective* (which may not be dependent on a subsequent measure) and *operative* (which may be dependent on a subsequent measure):

> "The Act went into effect as a law upon the expiration of ninety days from and after the final adjournment of the legislative session. Its operative effect was suspended until the happening of the contingency designated in the Act. 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."

Id. at 389.

Operative is the key term: "the legislature may constitutionally enact a law and make its *operation* depend upon the contingency of the [subsequent law] being, or not being, in effect[.]" *Id*. at 392 (emphasis added). As a result, when in the exercise of legislative power a law is made contingent on a future occurrence, it is the operation—not effect—of the law that remains dormant.

Regardless of the nature of the contingency, since *Hecker*, the lawful term "operative" has been used uniformly and the unlawful term "effective" has

never been used to mean "operative." Examples include contingencies based on:

1. Future judicial interpretation, 2003 Or Laws, ch 801, § 25(1):

> The amendments to ORS 293.535 by section 22 of this 2003 Act *become operative* 31 days after entry of a final judgment that invalidates the amendments to ORS 293.535 by section 21 of this 2003 Act.

2. Future action by voters, 1987 Or Laws, ch 565, § 2:

> If approved by the electors of the Port of Coos Bay * * *, this * * * Act *becomes operative* on January 1, 1988.

3. Future adoption of rules, 1995 Or Laws, ch 662, § 7:

> ORS 465.315(1)(b)(B), (d) and (e) as set forth in this Act shall not *become operative* until the Environmental Quality Commission adopts implementing rules pursuant to ORS 465.315(2) as set forth in this Act.

4. Future action by Congress, 1995 SB 8, § 9:

> Section 8 of this Act and the amendments to statute sections by sections 1 to 7 of this Act *become operative* when Congress enacts a law repealing the federal maximum speed limits or otherwise lifts any requirement that states enact specific speed limits in order to receive federal funds.

5. Future action by the Legislative Assembly, 2005 SB 3402, § 164(2):

> Notwithstanding subsection (1) of this section, sections 33 to 148 and 162 of this 2005 Act and the amendments to statutes by sections 149 to 160 of this 2005 Act do not *become operative* if this state has not entered into the Streamlined Sales and Use Tax

> Agreement, as defined in section 25 of this 2005 Act, by January 1, 2006.

The proponents of Measure 47 did not make the law's *operation* contingent on a change in the interpretation or terms of the constitution; they provided for the contingencies to make the law "effective," and those contingencies Article I, section 21, does not permit.

The Court of Appeals compounded its error with two others. First, the Court of Appeals failed to credit another essential part of the context in which Measure 47 arose: the terminology used by the people themselves in other initiative measures. Second, the Court of Appeals missed or misread the history of the adoption of Measure 47.

The relevant context of an initiative or referred measure includes other provisions, especially provisions on the same ballot. *See Coultas v. City of Sutherlin*, 318 Or 584, 590, 871 P2d 465 (1994). The Court of Appeals, however, appears not to have considered (or, if considered, not to have credited) the understanding that voters would have gained from other measures. 2006 Measure 40, which was on the same ballot as Measure 47, demonstrates that the voters would have been aware of the use of "operative" to mean "operative" and "effective" to mean "effective." Section 1d (1) of Measure 40 provided:

> "Except as provided in this subsection, a reapportionment of districts enacted by the Legislative Assembly *becomes operative* on the next date at which a judge will commence a term of office. *On the effective date of the law* reapportioning the

> districts, the reapportionment *becomes operative* for the purpose of nominating and electing judges for the districts established by the reapportionment, and for the purpose of determining residency of persons seeking election to a judge position. Any judge whose term continues through the next date on which a judge will commence a term of office shall be assigned to a district."

For whatever reason, Measure 47 simply did not make this distinction.

The people have been used to being offered measures that use "operative," not "effective," to express a future contingency. For example, section 34 (2) of 2000 Ballot Measure 6, which also sought to limit campaign spending, used "operative," not "effective," to defer the application of a law:

> "In accordance with subsection (1) of this section:
>
> "(a) The amendments to ORS 260.188 and 316.102 by sections 27 and 28 or 29 of this 2000 Act *become operative* January 1, 2001;
>
> "(b) Sections 4, 7 to 19 and 22 to 26 of this 2000 Act *become operative* July 1, 2001; and
>
> "(c) Subject to section 39 of this 2000 Act, the repeal of statutes by section 33 of this 2000 Act *becomes operative* January 1, 2001.
>
> "(3) The Secretary of State may take any action prior to *the operative date* of any provision of this 2000 Act that is necessary to implement any provision of this 2000 Act on or after *the operative date* of any provision of this 2000 Act."

(Emphasis added). Likewise, in section 6 of 1996 Ballot Measure 38, voters were also asked to delay the application of a law through the use of "operative," not "effective":

> "This Act shall *become operative*:
>
> "(1) On public land, which includes federal lands:
>
> "(a) On January 1, 1997, for waters of the state that supply drinking water or constitute salmon, steelhead or trout habitat; and
>
> "(b) On January 1, 2002, for all other waters of the state.
>
> "(2) On private land:
>
> "(a) On January 1, 2002, for waters of the state that supply drinking water or constitute salmon, steelhead or trout habitat; and
>
> "(b) On January 1, 2007, for all other waters of the state." [5]

(Emphasis added).

In light of this consistent use of "operative" to reference a contingent future, voters cannot have intended for "effective" to express the same concept. The reference in Measure 47 to codification of the measure pending the measure's taking effect does not, as the Court of Appeals thought, suggest that voters intended for "effective" to mean "operative." The Court of Appeals appears to have attached some legal significance to the direction to "codify" Measure 47 pending the future events that would make the measure "effective." *Hazell*, 238 Or App at 498. But codification is the act of arranging and

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[5] *See also* Article VIII, section 7(3): "This section first *becomes operative* when federal law is enacted allowing this state to exercise such authority or when a court or the Attorney General of this state determines that such authority lawfully may be exercised." S.J.R. 8, 1989, adopted by the people June 27, 1989 (emphasis added).

publishing—nothing more. The Preface to the Oregon Revised Statutes, p. vii, explains that the act of codifying a law is essentially an editorial task:

> "The 17 volumes of statute text contain, with some exceptions, the statute laws of Oregon of a general, public and permanent nature in effect on January 1, 2010 (the normal effective date of the Acts passed by the 2009 regular session of the Seventy-fifth Legislative Assembly). Exceptions arise because not all laws take effect on or before the usual effective date.
>
> "The text of every statute section compiled in *Oregon Revised Statutes* is reproduced verbatim from an enrolled Act, with the exception of the changes in form permitted by ORS 173.160 and other changes specifically authorized by law."

Not surprisingly, therefore, many laws direct publication in the state's permanent code. *See, e.g.*, 2009 Or Laws, ch 98, § 1 ("Section 2 of this 2009 Act is added to and made a part of ORS chapter 561."). Those directions say nothing about whether the lawmakers intended for some contingency to occur to cause the law to take effect and should not have been taken as evidence that voters intended for "effective" to mean "operative."

It is not clear why the Court of Appeals considered the history of the measure not to disclose the voters' intent to use "effective" in its lawmaking sense, *i.e.* become law. The Court of Appeals should not have given the adoption history such short shrift, because there is ample evidence.

> "This court has noted that caution is required in ending the analysis before considering the history of an initiated constitutional provision. 'In practice * * *

> courts rarely see disputes over interpretation when the opposing party cannot show a possible alternative reading of the words, which it claims to be correct in context.'"

Ecumenical Ministries, 318 Or at 559 n 7 (quoting *Lipscomb v. State*, 305 Or 472, 485, 753 P2d 939 (1988)).

The history of the adoption of Measure 47 shows that voters understood "effective" to mean "effective," not "operative." First, information on which voters relied referred to Measure 47 as "becom[ing] law," not becoming "operative." The Voters' Pamphlet informed voters that "[s]upporters wrote Measure 46 to allow the otherwise unconstitutional provisions in Measure 47 to become law" and that voters would "have to surrender [their] existing constitutional rights through Measure 46 for Measure 47 to even be able to take effect."[6] From The Oregonian, voters knew that Measure 47 "would become law only if voters approve both it and Measure 46."[7]

Supporters of Measure 47 also told voters that adopting Measure 46 was imperative, not just beneficial—a position that supporters would not have taken if Measure 47 could become law despite the failure of Measure 46: "Measures

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[6] Argument in Opposition to Ballot Measure 47 by SEIU Local 49 and SEIU Local 503, OPEU (Official Voters' Pamphlet, General Election, Nov. 7, 2006)).

[7] "Measures promise volatile shift in Oregon campaign spending," http://www.oregonlive.com/elections/oregonian/index.ssf?/base/news/1158980195219080.xml&coll=7 (Sept 23, 2006).

46 and 47 must both be passed, because they work together."[8] Opponents made the same point:

> 1. "Measures 46 and 47 * * * are designed to work together[.]"[9]
>
> 2. "[The] limits [in Measure 47] could not be imposed without Measure 46 taking away the Constitutional protections on freedom of speech[.]"[10]
>
> 3. "Even its sponsors admit that Measure 47 violates your existing free speech rights. That's why they also are asking for you to surrender those rights by constitutional amendment (Measure 46)."[11]

Thus, the text, context, and history of Measure 47 also support the interpretation of "effective" to mean "becomes law"—a result that Article I, section 21, prohibits.

In addition to text, context, and history, there is also logic that supports the interpretation of "effective" to mean "becomes law." Interpreting "effective" to mean "operative" "presents a variation on the 'chicken or the egg?' conundrum." *State v. Pine*, 181 Or App 105, 120, 45 P3d 151 (2002) (Haselton, J., dissenting), *rev'd*, 336 Or 194 (2003).

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[8] Argument in Favor of Ballot Measure 46 by Jackson County Citizens for the Public Good (Official Voters' Pamphlet, General Election, Nov. 7, 2006).

[9] Argument in Opposition to Ballot Measure 46 by Oregon School Employees Association (Official Voters' Pamphlet, General Election, Nov. 7, 2006).

[10] Argument in Opposition to Ballot Measure 47 by Planned Parenthood Advocates of Oregon (Official Voters' Pamphlet, General Election, Nov. 7, 2006).

[11] Argument in Opposition to Ballot Measure 47 by Oregon Education Association (Official Voters' Pamphlet, General Election, Nov. 7, 2006).

The Court of Appeals reads section (9)(f) to render Measure 47 inoperative until the constitution is amended or reinterpreted, but to reach that interpretation, the Court of Appeals must treat section (9)(f) as if that section were itself in effect and operative. The problem with this logic is that section (9)(f) is itself part of the Act that the Court of Appeals says is not yet operative. By making the *entire* Act—including section 9(f)—inoperative until some future event, the Court of Appeals achieves a reading that gives even section 9(f) no force and effect at all. If section (9)(f) renders "the Act" inoperative, then section (9)(f) must itself be inoperative, too. Thus, even under the Court of Appeals' interpretation, *nothing* in Measure 47 can *ever* be in force.

The consequence of making the effectiveness of a law depend upon a future constitutional amendment or interpretation is the invalidation of the entire law. Severing section (9)(f) from Measure 47 is not an option. A measure must be lawfully adopted before the measure's severability provision can come into play. *Armatta v. Kitzhaber*, 327 Or 250, 285 n 19, 959 P2d 49 (1998), explains:

> "Because this case concerns the procedural requirements for amending or revising the constitution, the question of severability, which was raised as an issue below in relation to plaintiffs' 'revision' challenge to Measure 40, is not an issue here. Severability relates to a substantive challenge, based upon a superior source of law, to certain provisions of a law or amendment that has been properly enacted or adopted. *Hart v. Paulus*, 296 Or. 352, 361, 676 P.2d 1384 (1984); *see also Oregon*

> *State Police Officers' Assn. v. State of Oregon*, 323 Or. 356, 380, 918 P.2d 765 (1996) (in concluding that a constitutional amendment, adopted by initiative petition, violated the Contracts Clause of the United States Constitution, the court applied principles of severability and concluded that no section could be saved). In contrast, this case concerns 'the legality of the enactment [or adoption] process itself.' *Hart*, 296 Or. at 361. *See also Lane Transit District v. Lane County*, 327 Or. 161, 169-70, 957 P.2d 1217 (1998) (stating that the severability clause in the measure at issue 'is (and would have to be) aimed at judicial construction of the measure after (and if) * * * it is adopted')."

A contingent effective clause is not a substantive provision; the effective clause is part of the enactment process:

> "Enabling legislation prepared at the same time as a constitutional amendment or revision must include a provision in the enabling Act to the effect that if the constitutional amendment or revision is not approved by the people at the election at which it is to be submitted, the enabling Act is not effective."

Bill Drafting Manual, p. 17.11 (describing what is also known as implementing legislation).

As a result, when a measure violates Article I, section 21, the result is always the invalidation of the entire measure. *See*, e.g., *General Electric Co.*, 207 Or at 333 (act is "unconstitutional and void, being in violation of * * * Art. 1, § 21"); *LaForge v. Ellis*, 175 Or 545, 554, 154 P2d 844 (1945) ("the challenged act is unconstitutional and void"); *Van Winkle v. Meyers*, 151 Or 455, 470, 49 P2d 1140 (1935) (violation of Article I, section 21, "in itself alone

* * * render[s] the act void"); *State ex rel Bissinger & Co. v. Hines*, 94 Or 607, 617, 186 P 420 (1920) (because in violation of Article I, section 21, "the act * * * is unconstitutional and void"); and *Portland v. Coffey*, 67 Or 507, 515, 135 P 358 (1913) (invalidating entire act when "the validity of the enactment [wa]s to depend upon a decision of the Supreme Court").

Without the invalidation of all of Measure 47, the state of Oregon's law will remain uncertain: Measure 47 will float on the wind like a spore until such time as a judge may decide that conditions are ripe for the spore to grow.

B. The Court should not accept petitioners' invitation to reconsider *Vannatta I.*

If the Court finds that Measure 47 is a valid law, the Court should simply affirm the Court of Appeals' decision without reaching petitioners' further constitutional arguments.

Petitioners have asked this Court to approve the constitutionality of each section of Measure 47 by reconsidering and overturning *Vannatta I*. Engaging in this constitutional exercise is unnecessary and imprudent under the circumstances of this case. For reasons discussed below, this Court should reject petitioners' request.

1. Jurisprudential considerations.

First, there is no pleading basis for declaring any of the particular sections of Measure 47 unconstitutional as violations of Article I, section 8, or for affirming their constitutionality. Petitioners did not plead that any section of

Measure 47 is unconstitutional, nor have the state or Intervenors done so. The trial court did not rule on the constitutionality of any of the particular sections of Measure 47. Rather, the trial court ruled that Measure 47 was inoperative by virtue of section 9(f) of the Act.

Moreover, the Court of Appeals also did not rule on the constitutionality of any of the components of Measure 47. As noted by the Court of Appeals, petitioners contended "that an individualized assessment of each of Measure 47's provisions relating to campaign contributions or expenditures is required[.]" *Hazell*, 238 Or App at 505. However, rather than engaging in a constitutional analysis of any of the provisions, the Court of Appeals determined that all of the substantive provisions in Measure 47 remain dormant until Article I, section 8, is amended or *Vannatta I* is overruled. *Id*. at 506. Here, the constitutional question concerning the validity and application of *Vannatta I* is not properly presented by the record. There is no pleading basis or lower court ruling from which this Court could properly address the constitutionality of the individual components of Measure 47. The Court should avoid an individual analysis of each section of Measure 47 or reconsideration of *Vannatta I* because it does not have the benefit of the analysis of the trial court or the Court of Appeals on these issues. In *Abbott v. DeKalb*, 346 Or 306, 211 P3d 246 (2009), this Court determined that it

improvidently granted review of the decision of the Court of Appeals. In its explanation, this Court stated that:

> "The issue that divided the Court of Appeals is an important one. However, the grounds for decision that the Court of Appeals did not discuss fully support the decision of the trial court and present independent bases to affirm that decision, *and we do not have the benefit of the Court of Appeals' analysis of those issues*. Given those circumstances, any opinion in this case on the merits of the statute of limitations question would address an issue that, although significant in the abstract, would not affect the result. We therefore conclude that our decision to allow review was improvident."

Id. at 310 (emphasis added). Here too, this Court lacks the benefit of the Court of Appeals' analysis of the constitutionality of particular sections of Measure 47.

In addition, this Court lacks a clear record on which to address the constitutionality of each section of Measure 47. None of the parties to this case have put forward evidence concerning the operation or effect of any particular section of Measure 47. Without such a factual record, this Court cannot properly analyze the important constitutional issues involved. *Gaffey v. Babb*, 50 Or App 617, 622, 624 P2d 616 (1981), *rev den*, 291 Or 117 (1981) ("constitutional issues should be decided based on a precise fact situation that property [sic] invokes the constitutional issues"); s*ee also Day v. State Acc. Ins. Fund*, 288 Or 77, 79, 602 P2d 258 (1979) ("However, after oral arguments plus an examination of the record and the transcript and the briefs in the Court of

Appeals, it appears that the record does not show what type of award the claimant received in California. The record is so inconclusive that we are unable to reach the issue upon which we granted review.").

2. There is no case or controversy sufficient to support adjudication of these matters.

In addition to the jurisprudential considerations analyzed above, this Court should not reconsider *Vannatta I* because to do so would require consideration of a hypothetical set of circumstances and would be tantamount to an advisory opinion. Such opinions are outside the scope of this Court's authority. *Brown v. Oregon State Bar*, 293 Or 446, 449, 398 P2d 193 (1982).

Section 9(f) of Measure 47 provides that if "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." This section does not reference individual sections of Measure 47; rather, it references the "Oregon Constitution" and its tolerance for limitations on campaign contributions or expenditures generally. As noted by the Court of Appeals, for the Constitution to be "found to allow" these limitations, the constitution would need to be amended or this Court would have to overrule critical aspects of *Vannatta I*. *See Hazell*, 238 Or App at 506. Although Measure 46 would have purported to amend the Constitution to tolerate these limitations, it was not adopted. Moreover, at the time Measure 47 was adopted,

the voters understood that there was no such tolerance in the Constitution. *Id*. at 508. Consequently, if this Court interprets Section 9(f) as merely a delayed operation provision, as the state argues, a court would need to overrule *Vannatta I* in another case to make Measure 47 operative. Such a case would feature parties who had standing and facts constituting a real case or controversy.

Here, there are no factual predicates or parties with standing who can challenge any of the components of Measure 47 or otherwise present any case or controversy to put *Vannatta I* at issue. Rather, petitioners are requesting an imprimatur or blessing of Measure 47, based on a hypothetical set of circumstances. Such a request constitutes an advisory opinion and should be denied. As stated by this Court in *Barcik v. Kubiaczyk*:

> "This court has applied the justiciability requirement to declaratory judgment actions for over fifty years and has noted the constitutional origins of that requirement.
>
> Deciding hypothetical cases is not a judicial function. Neither can courts, in the absence of constitutional authority, render advisory opinions. A declaratory judgment has the force and effect of an adjudication. Hence, to invoke this extraordinary statutory relief there must be an actual controversy existing between adverse parties."

321 Or 174, 188, 895 P2d 765(1995) (quotations omitted). In this case, none of the parties have even alleged that any of the substantive sections of Measure 47 are unconstitutional. Rather, petitioners are asking this Court to analyze a

hypothetical scenario in which a party might actually challenge the individual sections of Measure 47. Consequently, there is not an actual controversy existing between adverse parties on this issue. Since there is no actual controversy it would be inappropriate for this Court to reopen its decision in *Vannatta I*. *See Gortmaker v. Seaton*, 252 Or 440, 444, 450 P2d 547 (1969) ("In this state, however, we have strong precedent against advisory opinions. Mere difference of opinion as to the constitutionality of an act does not afford ground for invoking a judicial declaration having the effect of adjudication.") (citations omitted).

Moreover, there is another, more appropriate, mechanism for reexamining *Vannatta I.* Petitioners could refer a measure to the voters or persuade the Oregon Legislature to adopt some of the limitations petitioners included in Measure 47. A candidate or other aggrieved party would surely challenge the measure or statute in a real case with the benefit of a factual record. If this Court were then inclined to reexamine *Vannatta I*, such a reexamination could take place with the benefit of a record, a trial court decision and a decision from the Court of Appeals. In *Gortmaker*, a suit for declaratory relief brought by a district attorney claiming to be in doubt about the meaning of various statutes and regulations, this Court stated:

> "The construction of the statutes involved in this litigation can be accomplished, if necessary, in an adversary proceeding any time a defendant demurs to an indictment on the grounds that the indictment does

> not charge a crime. If a defendant should assert that the rules under which he is being prosecuted were not properly promulgated, the trial court can decide the question and either party can appeal. ORS 138.020. When a simple and convenient means is at hand for testing a law, a declaratory suit between friendly parties will not lie.
>
> "The questions which the parties have attempted to raise in this proceeding may very well be important ones. If so, the value of truly adversary proceedings is even more plain. The advocacy of those who have something at stake in the outcome of such litigation is far more helpful to a court of law than are the academic speculations of bystanders."

Id. at 444. The discussion in *Gortmaker* is instructive because it indicates that where a simple and convenient means for testing a law is available, a court should not address a constitutional issue on an advisory basis. The *Gortmaker* decision also affirms the value of a truly adversary proceeding. Here, a truly adversary proceeding can only be accomplished where a party has a concrete claim or defense that requires a determination of the constitutionality of particular sections of Measure 47. That is not the case presently before this Court.

3. *Stare decisis* counsels against reconsideration of Vannatta I.

This Court's constitutional rulings should not be disturbed absent a compelling justification. *Stranahan v. Fred Meyer, Inc*., 331 Or 38, 53-54, 11 P3d 228 (2000). In *Vannatta I*, this Court held that political campaign contributions and expenditures are "both * * * forms of expression for the

purposes of Article I, section 8." 324 Or at 524. It further held that mandatory restrictions on campaign contributions were unconstitutional. *Id*. at 537-41. While this Court has subsequently clarified some aspects of its holding in *Vannatta I*, *see Vannatta v. Oregon Government Ethics Comm.*, 347 Or 449, 465, 222 P3d 1077 (2009) ("*Vannatta II*"), it has not overruled the relevant passages from *Vannatta I* and the decision remains law.

Were this Court to determine that the question of the continuing validity of *Vannatta I* is properly before this Court it should nevertheless reject reconsideration of the decision in favor of *stare decisis*. "[T]he principle of stare decisis dictates that this court should assume that its fully considered prior cases are correctly decided. Put another way, the principle of stare decisis means that the party seeking to change a precedent must assume responsibility for affirmatively persuading us that we should abandon that precedent." *State v. Ciancanelli*, 339 Or 282, 290, 121 P3d 613 (2005). As explained by this Court in *Stranahan*, *stare decisis* is:

> "[A] doctrine that attempts to balance two competing considerations. On one hand is the undeniable importance of stability in legal rules and decisions. That consideration applies with particular force in the arena of constitutional rights and responsibilities, because the Oregon Constitution is the fundamental document of this state and, as such, should be stable and reliable. On the other hand, the law has a similarly important need to be able to correct past errors."

331 Or at 53.

Accordingly, this Court will only reconsider a previous ruling when "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." *Id*. at 54. This Court has determined that it will give particular weight to arguments that either present new information on the meaning of the constitutional provision or that demonstrate a failure on the part of this Court, when it made the earlier decision, to follow its normal paradigm for analyzing the constitutional provision in question. *Id.* Here, petitioners have failed to present any new information on the meaning of Article I, section 8. They have also failed to identify error in this Court's application of its usual paradigm for analyzing Article I, section 8. Consequently, this Court should not reconsider *Vannatta I*.

This Court can also take into account additional considerations when analyzing *stare decisis*, including the age of the precedent at issue and the extent to which it has been relied upon in other cases. *Farmers Ins. Co. of Oregon v. Mowry*, 350 Or 686, 693 n. 3, 261 P3d 1 (2011). Here, *Vannatta I* has been binding precedent for fourteen years, which weighs in favor of declining to reconsider it. Additionally, it has been cited forty-four times by Oregon appellate courts, indicating that it has been extensively relied upon in other cases. Moreover, *Vannatta I* was also relied upon by the voters when they passed Measure 47. The voters were told that the Measure would be effective

only if the Constitution were amended or unless *Vannatta I* was overturned. The voters rejected the constitutional amendment, however, allowing for the continued application of *Vannatta I*. The passage of Measure 47, including the language in section (9)(f) postponing its effect, should not be viewed as a request by the voters for the Court to reconsider *Vannatta I*, but as a sign that the voters recognized the importance of the stability of the rule of law.

4. Petitioners have not met their burden to show that *Vannatta I* was incorrectly decided.

Petitioners have not made a case that any "new" historical discoveries have been unearthed that will show that campaign contribution and expenditure limits were well established when the first American guarantees of freedom of expression were adopted nor have they shown that the guarantees in 1859 were not intended to reach campaign contribution limits and expenditure limits.

In *Vannatta I*, this Court found no historical exception that would save political contribution limits. 324 Or 538. This Court further stated:

> "The earliest indication that we have found of Oregon's distrust of the role that money plays in the political process is the 1909 'Corrupt Practice Act Governing Elections.'
>
> "That act prohibited certain corporation (such as banks and public utilities) from contributing to candidates. Title XXVII, Chapter XII, Section 3510. It also limited candidate expenditures to 15% of the annual salary for the elected office. Id. at § 3486."

Id. at 538 n 23.

To satisfy the historical exception, the restrictions (in this case, limitations on campaign contributions and expenditures) must be "wholly confined" within a well-established historical exception. *State v. Robertson*, 293 Or 402, 412, 649 P2d 569 (1982). It does not matter whether delegates to the Oregon Constitutional Convention would have disapproved of today's campaign financing practices any more so than whether the Victorian era adopters of the Oregon Constitution would have disapproved of nude dancing (*City of Nyssa v. Dufloth*, 339 Or 330, 121 P3d 639 (2005)), adult businesses (*City of Portland v. Tidyman*, 306 Or 174, 759 P2d 242 (1988)) or even live public sex shows (*State v. Ciancanelli*, 339 Or 282, 121 P3d 613 (2005)). The appropriate analysis is instead whether, at the time of the Oregon Constitution, such forms of expression were specifically restricted. Petitioners, as parties opposing a claim of constitutional privilege, have the burden of demonstrating that the limitations on campaign contributions and expenditures which they envision fall within an historical exception. This is a heavy burden. *Moser v. Frohnmayer*, 315 Or 372, 376, 845 P2d 1284 (1993).

Faced with this heavy burden, petitioners attempt to marshal historical materials for the purpose of suggesting that the founders understood "elections" in Article II, section 8, of the Constitution to include all pre-election day

activities. They believe that Article II, section 8 therefore trumps the free speech protections of Article I, section 8.[12]

Article II, section 8, provides:

> "The Legislative Assembly shall enact laws to support the privilege of free suffrage, prescribing the manner of regulating, and conducting elections, and prohibiting under adequate penalties, all undue influence therein, from power, bribery, tumult, and other improper conduct."

This Court has already rejected petitioners' "new" theory:

> "We should construe 'elections' to refer to those events immediately associated with the act of selecting a particular candidate or deciding whether to adopt or reject an initiated or referred measure."

Vannatta I at 530. In an attempt to satisfy their "heavy burden," petitioners criticize the *Vannatta I* Court's use of the 1928 edition of Webster's dictionary. Petitioners also argue that, by the time of the adoption of the Oregon Constitution, the term "election" had expanded in meaning to include the entire campaign. They contend that "election" was used in that sense in other state constitutions, upon which Oregon's constitution was modeled, and in state legislation. Horton Petitioners Opening Brief on Review, p. 35. Petitioners fail, however, to identify even one pre-1859 Oregon territorial statute that

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[12] If Article II, section 8, can "trump" Article I, section 8, of the Oregon Constitution and if "election" is somehow interpreted to mean and include all "campaign" activities, the natural consequence would be to empower the legislature to pass laws regulating what can be said during the course of any political campaign.

limited campaign contributions or expenditures. Instead, they identify an isolated Texas statute adopted in August of 1856 of which the Oregon delegates may not have been aware (Horton 46) and cite only to statutes that merely prohibited "undue influence" of voters, pre-election wagering, bribing voters or others to procure any other person to be elected, procuring voters to change residences and other election conduct. Not only do these examples have no bearing on campaign contribution or expenditure limitations, they also date anywhere from 1864 through the 1870s, well after the Oregon Constitution was adopted.

Even in 1859, the term "electioneering" was a well-recognized concept separate and apart from an "election." Petitioners' own references make clear that these were separate concepts and do little more than support *Vannatta I*'s holding in this regard. *See* references cited at Horton 51 through 54, differentiating "election" from "election campaign" and "electioneering."

In contrast to petitioners' unfounded claims, there is much evidence in the historical record that supports the position taken by this Court in *Vannatta I* concerning the construction of the term "elections" for the purposes of interpreting Article II, section 8. For instance, there are numerous references to "election" in the proceedings and debates of the Constitutional Convention of 1857. Charles H. Carey ed., *The Oregon Constitution and Proceedings and*

Debates of the Constitutional Convention of 1857, Oregon Historical Society (1984).

On September 10, 1857, the Constitutional Convention reverted to the Committee of the Whole to debate an article on "suffrages and elections." The discussion pertained to qualifications of voters and many other matters all relating to the temporal event of an election. Carey, *The Oregon Constitution* at 325. Likewise, on September 12, 1857, a debate ensued concerning the dates of "elections" and whether on those days votes would be counted by ballot or voting by voice. Carey, *The Oregon Constitution* at 337. These and all other references to the term "election" during the Constitutional Convention pertained to an "election" as a temporal event. *See* Carey, *The Oregon Constitution* at 341 (Debate of September 15, 1857), 367 (Debate of September 16, 1857). The index to the proceedings and debates makes no reference whatsoever to the term "election" being used in the manner suggested by petitioners in this case.

In addition, Article I, section 4, of the original United States Constitution of 1787 suggests a temporal meaning for the term "election." ("T[he] Time, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations except as to the Places of chusing Senators").

The United States Supreme Court in *Foster v. Love*, 522 US 67, 69, 1185 S Ct 464, 139 L Ed 2d 369 (1977), defined "election" in a nearly identical way to that chosen by this Court in *Vannatta I*. According to the U.S. Supreme Court, "election" means the combined actions of voters and officials meant to make a final selection of an office holder

> "When the Federal statutes speak of the 'election' of a Senator or a Representative, they plainly refer to *the combined actions of voters and officials* meant to make a final selection of an office holder (subject only to the possibility to the later runoff). By establishing a particular day as '*the day*' on which '*these actions*' must take place, the statutes simply regulate the time of the election, a matter on which the Constitution explicitly gives Congress the final say.

Foster, 522 US at 71-72 (emphasis added) (citations omitted).

In addition, the United States Congress often considered bills pertaining to "elections" during the 1850s.[13] For instance, on July 11, 1857, Congressman Bennett introduced H.R. 442, pertaining to the regulation of municipal elections in the city of Washington. Throughout the legislation, the term "election" has a temporal meaning and is an event which takes place on a specific day. *See* Appendix 1-4. On August 5, 1856, Senator Butler introduced S. 428 relating to the election of the President and Vice President of the United States by the Electoral College. Throughout that legislation, the word "election" has a

[13] Electronic copies of legislation introduced in Congress in the 1850s are available at http://memory.loc.gov/ammem/hlawquery.html.

temporal meaning and refers to the time and places of a meeting to vote for a President and a Vice President of the United States. *See* Appendix 5-6. On January 31, 1857, Congressman Grow introduced H.R. 799 requiring the Governor of the Kansas Territory to fix a time and place for election of members of the Legislative Assembly due to concerns that the Kansas Legislature had not been elected by the legal voters of Kansas, but rather had been forced upon them, by nonresidents in violation of the organic act of the Territory. *See* Appendix 7-10. On February 21, 1860, Senator Seward introduced S. 194, a bill to admit the State of Kansas into the Union. The whereas clause of the bill referenced that the people of the Territory of Kansas had ratified and adopted, at an election held for that purpose on a particular day, a constitution and state government. *See* Appendix 11-15. In all of these examples and in numerous others, when Congress referenced the term "election" it meant a temporal voting event involving the appointment of public officers or for the determination of a question. Counsel have been unable to locate any congressional legislation during the times in which the Oregon Constitutional Convention took place in which the term "election" implied anything other than a temporal voting event, notwithstanding the suggestions of petitioners.

Finally, petitioners suggest that this Court should also reconsider *Vannatta I* and determine that the incompatibility exception should save laws

which purport to regulate and limit campaign contributions and expenditures. The *Hazell* petitioners criticize *Vannatta I* as having rejected the incompatibility exception based upon "undocumented recitation of history." *Hazell*, 238 Or App at 57. Instead, the Hazell petitioners suggest that the specific "findings of fact" contained within § 1 of Measure 47 should require "near complete judicial deference," suggesting that the voters should have an opportunity to rewrite history by legislative fiat.

Oregon appellate courts have used the incompatibility exception to validate speech restriction in only three cases, one involving the solicitation (but not receipt) of campaign contributions by judges (*In re: Fadeley*, 310 Or 548, 802 P2d 31 (1990)), one involving prejudicial statements by a prosecutor about pending criminal proceedings (*In re: Lasswell*, 296 Or 121, 673 P2d 855 (1983)), and one involving published statements by a judge about pending cases and litigants (*In re: Schenck*, 318 Or 402, 870 P2d 185 (1994)).

The petitioners bear a remarkably heavy burden to show that the incompatibility exception applies to allow an otherwise unconstitutional infringement upon Article I, section 8, rights. As the cases make clear, the incompatibility exception only applies where the expression restricted by the statute is *always* incompatible with a public official's role. *Vannatta I*, 324 Or at 541 ("it cannot be contended that the expression in question actually impairs performance of, e.g. legislative functions in all cases").

The incompatibility exception has never been extended to legislators and there is nothing in *Fadeley* or the other incompatibility cases (all of which apply to judicial officers) that suggests it should be. Legislative office is inherently more political than judicial office and legislative processes are entirely different than judicial processes. Justice Unis, in his dissent in *Fadeley,* discussed some of the significant differences between judicial and nonjudicial offices:

> "I recognize that a state need not treat candidates for judicial office the same as candidates for other elective offices. A judicial office is different in key respects from other elective offices. The state may, subject to constitutional constraints, regulate the conduct of its judges with the differences in mind.
>
> "For example the contours of the judicial function make inappropriate the same kind of particularized pledges of conduct in office that are the very stuff of campaigns for most non-judicial offices. A candidate for the mayoralty can and often should announce his determination to effect some program, to reach a particular result on some question of city policy, or to advance the interests of a particular group. It is expected that his decisions in office may be predetermined by campaign commitment. Not so the candidate for judicial office. He [or she] cannot, consistent with the proper exercise of his [or her] judicial powers, bind himself [or herself] to decide particular cases in order to achieve a given programmatic result. Moreover, the judge acts on individual cases and not broad programs.
>
> "*Morial v. Judiciary Com'n of State of Louisiana,* 565 F.2d 295, 305 (5th Cir 1977), cert. denied 435 U.S. 1013, 98 S Ct 1887, 56 L.Ed.2d 395 (1978). A state may require candidates for judicial office to maintain a higher standard of conduct than can be expected in other types of elective contests. Judges and lawyers

> are members of a responsible profession, and their adherence to their profession's ethical standards may require abstention from what, in other circumstances, would be constitutionally protected behavior. *See*, e.g., In *re: Lasswell*, supra."

310 Or at 589-590.

Finally, petitioners contend that the Court should simply defer to the voters in making "findings" as to whether the prohibited expenditures are incompatible as if this were simply a matter of "line drawing" that should be committed to the discretion of the voters.[14] That approach, however, fails to appreciate that Article I, section 8, is "directed at the legislature and other lawmaking bodies." *Ciancanelli*, 339 Or at 292. Indeed, this Court has said of Article I, section 8, that "one is struck by its sweeping terms * * * with respect to the legislative power ('*no*' law shall be passed restraining * * * or restricting)[.]" *Id.* at 311 (emphasis in original). It would create quite a perversion of Article I, section 8, if the courts simply deferred to the voters (the very political body whose powers are limited by Article I, section 8) the responsibility of determining what expression can, and cannot, be restrained.

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[14] Hazell petitioners contend that these legislative findings are entitled to near complete judicial deference and cite to *State ex rel. VanWinkle v. Farmers Union Co-op Creamery of Sheridan*, 160 Or 205, 219-220, 84 P2d 471 (1938). A close reading of this case, however, discloses that although declarations of the legislature that certain facts exist which are deemed sufficient to support and justify the action taken by it are of aid when the constitutionality of an act is at issue, such "findings" do not preclude judicial inquiry into the actual facts. *Id*. at 219. Popular views, disguised as facts can always be inserted in legislation. But a "finding" that 2 + 2 = 5 does not make it so.

Rather, the legislature's role is to enact laws in the first instance and then the court must determine whether such laws meet the constitutional requirements. Petitioners' "fox guarding the henhouse" approach is without support, as there is no deference given by the courts in interpreting the sweeping and prohibitory terms of Article I, section 8. *See, e.g., City of Nyssa v. Dufloth,* 339 Or at 340 (rejecting the lawmaking body's "line drawing" that nude dancers remain at least four feet from the audience).

CONCLUSION

For the foregoing reasons, Intervenors submit that this Court should determine that Measure 47 is invalid in its entirety under Article I, section 21. Alternatively, if the Court finds that Measure 47 is effective (and perhaps not yet operative), it should nevertheless reject petitioners' invitations to reexamine

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and overrule *Vannatta I* and to analyze all substantive provisions of Measure 47 under some new constitutional standard.

DATED this 23rd day of November, 2011.

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

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34th CONGRESS,
1st SESSION.

[redacted]

[No report.]

IN THE HOUSE OF REPRESENTATIVES.

JULY 11, 1856.

Read twice, and laid upon the table.

Mr. H. S. BENNETT, from the Committee on the District of Columbia, reported the following bill:

A BILL

Regulating municipal elections in the city of Washington.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the second section of the act approved May sixteenth, eighteen hundred and fifty-six, entitled "An act to provide for at least two election precincts in each ward in the city of Washington, and for other purposes, be, and the same is hereby, repealed; and that from and after the passage of this act, every free white male resident of the city of Washington of the age of twenty-one years, (vagrants, paupers, felons, and persons *non compos mentis* excepted,) who shall have resided in the city one year immediately preceding the day of election, and who shall be a citizen of the United States at the time he offers to vote, and shall have paid the school tax and all taxes on personal property due from him, shall be entitled to vote

in the ward of which he shall be on the day of election, and shall have been for thirty days preceding a *bona fide* resident, for mayor, members of the board of aldermen and common council, register, collector, surveyor, assessors, and such other officers as may hereafter be made elective. *Provided,* That in all cases where the person so otherwise entitled and offering to vote, shall not have been resident of the particular ward in which he is resident *bona fide* upon the day of election for the space of one month immediately previous thereto, then such person shall be entitled to vote in the ward in which he last previously resided.

SEC. 2. *And be it further enacted,* That if, at any election for municipal officers in the city of Washington, the right of any person to vote shall be challenged, the oath or affirmation of such person made before the commissioners of election, (any one of whom is hereby authorized to administer the same,) verifying the existence of the qualifications in respect of which he may be challenged, shall be deemed and taken to be sufficient *prima facie* evidence of his right to vote, and said oath shall be noted on the list of persons who vote to be returned to the register of the city; and if any such person shall knowingly swear falsely in the premises, he shall, upon indictment and conviction thereof before any court competent to try the same, be adjudged guilty of wilful and corrupt perjury, and punished accordingly.

SEC. 3. *And be it further enacted*, That if any commissioner or other person appointed to superintend municipal elections shall wilfully and knowingly refuse to receive the vote of a person possessing the legal qualifications to vote at such election, as prescribed in the first section of this act, or shall refuse to administer the oath or affirmation required by the second section when called upon so to do, or shall in any other manner hinder or prevent the legal exercise of the elective franchise in the city of Washington, he shall, upon indictment and conviction thereof before the criminal court of the District of Columbia, be subject to imprisonment in the county jail for a period of time not exceeding six months, and to a fine not exceeding two hundred dollars, in each case, at the discretion of the court, and shall thereafter be ineligible to any office under the city corporation, besides being liable in damage to the party whose vote shall be so rejected.

SEC. 4. *And be it further enacted*, That the penalties prescribed in the foregoing section of this act shall apply to any commissioners or other person appointed to superintend an election who may wilfully and knowingly receive, or permit to be received, the vote of any person not legally authorized to vote; and, also, to any person or persons who may vote illegally, or more than once at any municipal election; and, also, to any person or persons who may wilfully disturb, molest, hinder, or interfere with said commissioners while in the dis-

charge of their duties, or who may wilfully disturb, molest, hinder, or interfere with any voter while at or going to the polls; and in making the returns of any election to the register of the city, the commissioners or other persons appointed to superintend said election shall also make a return of all the ballots cast on the occasion, to be securely kept for a period of at least two years.

SEC. 5. *And be it further enacted*, That in the joint meeting of the boards of aldermen and common council for the appointment of commissioners of elections, as provided in the sixth section of the act approved May fifteenth, one thousand eight hundred and twenty, entitled "An act to incorporate the inhabitants of the city of Washington, and to repeal all acts heretofore passed for that purpose," no member of either board shall be entitled to vote for more than two of the three commissioners to be elected for each ward or election precinct, and in all cases the three persons having the highest number of votes shall be declared duly elected.

SEC. 6. *And be it further enacted*, That full power is hereby given to the corporation of Washington to adopt all such regulations as may be necessary to give force and effect to the provisions of this act; and that all acts and parts of acts inconsistent with this are hereby repealed.

34TH CONGRESS,
1ST SESSION.

S. 428.

IN THE SENATE OF THE UNITED STATES,

AUGUST 5, 1856.

Mr. BUTLER, from the Committee on the Judiciary, submitted a report, (No. 260,) accompanied by the following bill; which was read the first and second times, considered as in Committee of the Whole, and postponed to, and made the special order for, Monday next, the 11th August.

A BILL

Supplementary to the several acts in force relative to the election of President and Vice President of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in case of removal, death, resignation, or inability, both of the President and Vice President of the United States, the President of the Senate *pro tempore*, and if there be no President of the Senate, then the Speaker of the House of Representatives for the time being shall act as President of the United States until the disability be removed or a President shall be elected; and if there should be no President of the Senate nor Speaker of the House of Representatives for the time being, and it be not a case of vacancy caused by removal, the chief justice of the Supreme Court of the United States, or if there be no chief justice in office, or it be a case of vacancy caused by removal, then the associate justices of the

said Supreme Court, successively, according to seniority of commission, shall act as President of the United States until the disability be removed or a President shall be elected: *Provided, however,* That in case any person holding either of the offices mentioned in this section shall not have the qualifications prescribed for President of the United States by the Constitution, or shall be under impeachment, then the next officer in succession (as hereinbefore specified) who may have the requisite qualifications, and not under impeachment, shall act as President of the United States until the disability be removed or a President shall be elected.

SEC. 2. *And be it further enacted,* That the electors appointed or chosen in the several States, pursuant to the tenth section of an act relative to the election of a President and Vice President of the United States, and declaring the officer who shall act as President in cases of vacancies in the offices both of President and Vice President, approved the first day of March, in the year seventeen hundred and ninety-two, shall, at the time and places of meeting to vote for a President of the United States, as prescribed in the said section, vote also for a Vice President of the United States; and that the term of the President and Vice President so elected shall commence on the fourth day of March next succeeding such election, and continue for the period specified in article second, section first, of the Constitution of the United States.

34TH CONGRESS,
3D SESSION.

H. R. 799.

IN THE HOUSE OF REPRESENTATIVES.

JANUARY 15, 1857.

Ordered to be printed.

JANUARY 31, 1857.

Read twice. Motion to recommit and previous question pending.

FEBRUARY 4, 1857.

Ordered to be printed.

Mr. GROW, from the Committee on Territories reported the following bill:

A BILL

For the relief of the people of Kansas.

WHEREAS the President of the United States transmitted to the House, by message, a printed pamphlet purporting to be the laws of the Territory of Kansas, passed at Shawnee Mission, in said Territory;

AND WHEREAS unjust and unwarranted test oaths are prescribed by said laws as a qualification for voting or holding office in said Territory; and whereas the committee of investigation sent by the House to Kansas report that said legislature was not elected by the legal voters of Kansas, but was forced upon them by non-residents, in violation of the organic act of the Territory, and having thus usurped legislative power, it enacted cruel and oppressive laws: Therefore—

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all rules or regulations purporting to be laws, or in the form

of law, adopted at Shawnee Mission, in the Territory of Kansas, by a body of men claiming to be the legislative assembly of said Territory, and all acts and proceedings whatsoever of said assembly, are hereby declared invalid and of no binding force or effect.

SEC. 2. *And be it further enacted,* That the governor of said Territory shall, as soon as practicable, by public proclamation fix the time and places for an election of members of the legislative assembly, appoint in each district three competent persons to superintend the election therein, under such rules and regulations as he shall direct, and shall prescribe the mode and manner for the returns thereof.

SEC. 3. *And be it further enacted,* That any person offering to vote at said election whose vote shall be challenged, shall, in addition to lhe qualifications for voting fixed in the act of Congress organizing the Territory, prove by his own oath that he is a bona fide settler of said Territory, and by the oath of at least two legal voters that he is, and has been for one month immediately preceding, an actual resident of said Territory, and for fifteen days a resident of the election district where he offers to vote.

SEC. 4. *And be it further enacted,* That if any person, not being an actual inhabitant or resident of the said Territory, shall cast his vote at any election which may be held in the said Territory by authority of law, such person so offending

shall, on conviction thereof in any criminal court, be punished by fine, not less than twenty dollars nor more than one hundred dollars, and imprisonment, not less than two months nor more than six months.

That if any person or persons shall come into any election district of said Territory in armed and organized bodies for the purpose of participating in, disturbing, controlling, or voting at any election held, or to be held, under the authority of law therein, such person or persons so offending shall, on conviction thereof in any criminal court, be punished by a fine of not less than one hundred dollars and not exceeding five hundred dollars, and imprisonment for a term not less than three months and not exceeding one year.

SEC. 5. *And be it further enacted,* That if any person, being a member of any such armed and organized body as described in the preceding section, or connected therewith, and a non-resident of the said Territory, shall vote at any election which may be held in the said Territory by authority of law, he shall, on conviction thereof, be punished by a fine of not less than one hundred dollars and not exceeding five hundred dollars, and by imprisonment for a term of not less than six months and not more than two years.

SEC. 6. *And be it further enacted,* That any judge of election who shall wilfully and knowingly allow any vote to be polled in violation of the fourth and fifth sections of this act,

shall, on conviction thereof, be punished by a fine of not less than fifty dollars nor more than three hundred dollars, and imprisoned for a term of not less than six months nor more than one year.

That all offences under this act may be prosecuted by indictment in any criminal court having jurisdiction of felonies or misdemeanors committed in said Territory.

All laws, rules, or regulations inconsistent with the provisions of this act are hereby declared null and void.

36TH CONGRESS,
1ST SESSION.

S. 194.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 21, 1860.

Agreeably to notice, Mr. SEWARD asked and obtained leave to bring in the following bill; which was read and passed to a second reading.

FEBRUARY 23, 1860.

Ordered to be printed.

A BILL

For the admission of the State of Kansas into the Union.

WHEREAS the people of the Territory of Kansas, by their representatives in convention assembled at Wyandott, in said Territory, on the twenty-ninth day of July, one thousand eight hundred and fifty-nine, did form for themselves a constitution and State government, republican in form, which was ratified and adopted by the people at an election held for that purpose, on Tuesday, the fourth day of October, one thousand eight hundred and fifty-nine, and the said convention has in their name and behalf asked the Congress of the United States to admit the said Territory into the Union as a State, on an equal footing with the other States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the State of Kansas shall be, and is hereby, declared

to be one of the United States of America, and admitted into the Union on an equal footing with the original States, in all respects whatever. And the said State shall consist of all the territory included within the following boundaries, to wit: Beginning at a point on the western boundary of the State of Missouri, where the thirty-seventh parallel of latitude crosses the same; thence west, on said parallel to the intersection of the one hundred and second meridian of longitude west from Greenwich; thence northward on said meridian to the fortieth parallel of latitude; thence east on said parallel to the western boundary of the State of Missouri; thence south with the western boundary of said State to the place of beginning: *Provided*, That nothing contained in the said constitution respecting the boundary of said State shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with such Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the State of Kansas, until said tribe shall signify their assent to the President of the United States to be

included within said State; or to effect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property or other rights, by treaty, law, or otherwise, which it would have been competent to make if this act had never passed.

SEC. 2. *And be it further enacted,* That, until the next general census shall be taken and an apportionment of representatives made, the State of Kansas shall be entitled to one representative in the House of Representatives of the United States.

SEC. 3. *And be it further enacted,* That nothing in this act shall be construed as an assent by Congress to all or to any of the propositions or claims contained in the ordinance of the constitution of the people of Kansas, or in the resolutions thereto attached; but the following propositions are hereby offered to the said people of Kansas, for their free acceptance or rejection, which, if accepted, shall be obligatory on the United States and upon the said State of Kansas, to wit: First. That sections numbered sixteen and thirty-six in every township of public lands in said State, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands, equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of schools. Second. That seventy-two sections of land shall be set apart and reserved for the

use and support of a State university, to be selected by the governor of said State, subject to the approval of the Commissioner of the General Land Office, and to be appropriated and applied in such manner as the legislature of said State may prescribe for the purpose aforesaid, but for no other purpose. Third. That ten entire sections of land, to be selected by the governor of said State, in legal subdivisions, shall be granted to said State for the purpose of completing the public buildings, or for the erection of others at the seat of government, under the direction of the legislature thereof. Fourth. That all salt springs within said State, not exceeding twelve in number, with six sections of land adjoining, or as contiguous as may be to each, shall be granted to said State, for its use, the same to be selected by the governor thereof within one year after the admission of said State, and when so selected, to be used or disposed of on such terms, conditions, and regulations as the legislature shall direct: *Provided*, That no salt spring or land, the right whereof is now vested in any individual or individuals, or which may be hereafter confirmed or adjudged to any individual or individuals, shall by this article be granted to said State. Fifth. That five per centum of the net proceeds of sales of all public lands lying within said State which shall be sold by Congress after the admission of said State into the Union, after deducting all the

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expenses incident to the same, shall be paid to said State, for the purpose of making public roads and internal improvements, or for other purposes, as the legislature shall direct: *Provided*, That the foregoing propositions, hereinbefore offered, are on the condition that the people of Kansas shall provide by an ordinance, irrevocable without the consent of the United States, that said State shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulations Congress may find necessary for securing the title in said soil to bona fide purchasers thereof; and that in no case shall non-resident proprietors be taxed higher than residents. Sixth. And that the said State shall never tax the lands or the property of the United States in said State: *Provided, however*, That in case any of the lands herein granted to the State of Kansas, have heretofore been confirmed to the Territory of Kansas for the purposes specified in this act, the amount so confirmed shall be deducted from the quantity specified in this act.

CERTIFICATE OF COMPLIANCE WITH LENGTH LIMITATIONS AND TYPE SIZE REQUIREMENTS ORAP RULE 5.05 and ORAP 9.05(3)(a)

Length of Answering Brief and Brief on the Merits of Intervenor-Respondents and Cross-Appellants

I certify that (1) the foregoing ANSWERING BRIEF ON THE MERITS OF INTERVENOR-RESPONDENTS, CROSS-APPELLANTS AND RESPONDENTS ON REVIEW complies with the word-count limitation of 18,000 words set forth in the Amended Order Granting Motion to Consolidate, to File an Overlength Brief and to Modify Briefing Schedule and Granting Leave to File Reply Briefs dated October 28, 2011, and (2) the word count of this Petition for Review as described in ORAP 5.05(2)(a) is 11,552 words.

Type Size

I certify that the size of the type in this ANSWERING BRIEF ON THE MERITS OF INTERVENOR-RESPONDENTS, CROSS-APPELLANTS AND RESPONDENTS ON REVIEW is not smaller than 14 point for both the text and footnotes as required by ORAP 5.05(4)(f).

Dated: November 23, 2011

/s/ John DiLorenzo

John A. DiLorenzo, Jr.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I FILED the original ANSWERING BRIEF ON THE MERITS OF INTERVENOR-RESPONDENTS, CROSS-APPELLANTS AND RESPONDENTS ON REVIEW by Efile this date and further that I SERVED it by Efile on the parties marked with an asterisk below and by depositing two true copies in the U.S. Postal Service at Portland, Oregon, in sealed envelopes, first class postage prepaid, this date addressed to counsel John Kroger. I SERVED it also by emailing a true copy to each counsel below.

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