

IN THE SUPREME COURT OF THE STATE OF OREGON

BRYN HAZELL, FRANCIS NELSON, TOM CIVILETTI,
DAVID DELK, and 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 nonpro@
corporation, and FRED VANNATTA,
Intervenors-Respondents, Cross-Appellants,
Respondents on Review.

Court of Appeals A137397
Supreme Court S059245 (control) S059246

PETITION FOR RECONSIDERATION OF APPELLANTS THE HORTON PETITIONERS
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Date of Decision: October 4, 2012
Opinion of the Court and
Concurring in Part and Dissenting in Part Opinion of Durham, J.

January 18, 2013

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(attorneys continued on following page)

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P3d 174 (2012), in determining when it is appropriate to remand for father proceedings. Application of those factors would result in such remand instructions under these facts.

This Court concluded that Plaintiffs had failed "to allege a justiciable controversy under the declaratory judgment act, as to the individual provisions of Measure 47." 352 Or at 467. But this conclusion applies to what the majority deem defects in pleading present facts about the justiciability of the constitutional issues for purposes of declaratory relief, not that Complaint was non-justiciable as filed and could never be replead.

The opinion necessarily assumes *sub silentio* that Plaintiffs had both standing to seek a declaration that the defendants had a duty to enforce the Act and that issue was justiciable. Thus, under ORS 20.020 -.080 Plaintiffs had standing and stated at least one justiciable controversy under presently existing facts--the duty of the state officers under the applicable provisions of the Oregon Constitution to voter-enacted statutory terms. "The controversy involves present facts, the plaintiff's existing statutory duty." *Brown v. Oregon State Bar*, 293 Or 446, 450, 648 P2d 1289 (1982); *Pendleton School Dist. 16R v. State*, 345 Or 596, 604, 200 P3d 133 (2009) (same, considering a present declaration about a future duty of a branch of government under the terms of the Oregon Constitution).

The majority concludes that the Complaint was deficient in alleging any further current controversy for continued jurisdiction under ORS 20.020, *et seq.*, since the majority concludes that the alleged failure to enforce the terms of

Ballot Measure 47 resulted from the "dormancy clause" of that Act itself, thus rendering not ripe the dispute over the present constitutionality of any term within Measure 47 for the purposes of the Declaratory Judgment Act.

The trial court had granted summary judgment and hence dismissed with prejudice. This Court has affirmed the lower court's dismissal of the claims but on the grounds that it deems the pleadings defective in seeking present relief. No court has addressed any other of the multiple asserted bases for standing/jurisdiction/ripeness.

The pleading defect identified by this Court would seem to be a matter within ORCP 21A(1) and (8) and are grounds for dismissal which arose *pendent lite* and only after the threshold decision of a declaratory ruling upon the duties of the officers was resolved. Properly presented, the consideration of such Rule 21 motions, even if granted, would ordinarily result in a dismissal of the Complaint (but not the action) without prejudice.

We note here that no party raised these Rule 21 defenses to the trial court or even in the Court of Appeals. If raised, Plaintiffs would have had the opportunity to replead to conform to changed litigation circumstances. The outcome of this case should not depend upon a defense not raised at trial, when that defense could be overcome by amended pleading.

This Court did not conclude that the Complaint had no possibility of being cured through amendment, and the concurrence of Justice Durham suggests that it could in fact be addressed. 352 Or at 472.

The relevant inquiry is whether [the party] would suffer prejudice

from a dismissal with prejudice that he would not suffer from a dismissal without prejudice.

State v. Gunder, 154 OrApp 332, 964 P2d 265 (1998). The difference here between dismissal with prejudice and the appropriate dismissal without prejudice is that Plaintiffs will be afforded immediate opportunity to exercise procedural rights and present additional present facts sufficient to demonstrate present and certain effects. It would have "practical effect on the rights of the parties."

State v. Peterson, 229 OrApp 564, 554-5, 215 P3d 897 (2009).

Entry of judgment with prejudice, when the appropriate judicial action is dismissal without prejudice, is error. *State v. Gutierrez*, 170 Or App 91, 93, 11 P3d 690 (2000). As *Jensen v. DuBoff*, 253 OrApp 517, 2012 WL 5709487 (2012) illustrates, this rule applies with equal force in civil proceedings.

Oregon courts apply the analyses of *Ramsey v. Thompson*, 162 OrApp 139, 143, 986 P2d 54 (1999), *review denied*, 329 Or 589, 994 P2d 130 (2000), and *Caldeen Construction v. Kemp*, 248 OrApp 82, 84, 273 P3d 174 (2012), in considering whether a trial court's denial of leave to amend a pleading amounts to abuse of discretion. We respectfully urge that the same factors should be considered relevant by the this Court in remanding for further proceedings, especially, where as here, no opportunity for repleading was presented to Plaintiffs, so no court has reviewed the viability of such pleading.

Jensen v. Duboff, *supra*, 253 OrApp at 523, summarizes the

Ramsey/Caldeen factors:

(1) the amendments would not have introduced new claims into the litigation, but would merely have clarified the plaintiffs' existing claims; (2) allowing the plaintiffs to amend would not have prejudiced

the defendant; and (3) the plaintiffs' motion to amend was made early in the proceedings, before discovery had occurred and a trial date had been set. *Caldeen Construction*, 248 OrApp at 89, 273 P3d 174. With respect to the fourth consideration, we held that, although the record did not allow us to assess the colorable merits of the proposed amendments, it "reveal[ed] no reason to believe that the complaint could not be amended to state a claim." *Id.*

Here, the first two factors strongly support allowing the Plaintiffs to put an amended pleading before the trial court. As for the third factor, Plaintiffs have had no opportunity amend "earlier" in the course of litigation. As for the fourth consideration, absent prejudgment now, by this Court, on what the Plaintiffs might adduce, there is "no reason to believe that the complaint could not be amended to state" claims.

Thus, this Court should remand the case to the Circuit Court for entry of a judgment of dismissal without prejudice.

We address below the other bases for justiciability provided by Plaintiffs.

III. PLAINTIFFS URGE RECONSIDERATION OF THE CONCLUSION THAT PLAINTIFFS HAD FAILED TO ALLEGE A JUSTICIABLE CONTROVERSY.

First, we incorporate the discussion of justiciability in the dissenting opinion of Justice Durham, 352 Or at 479-81, which correctly establishes that Plaintiffs pleaded a justiciable controversy.

Second, the Court's conclusion regarding justiciability applied only to the Declaratory Judgment Act. 352 Or at 467. Plaintiffs also presented justiciable controversy under ORS 246.910 and under ORS 183.484 and ORS 183.490, discussed below.

Third, the Court appears to have disregarded the actual pleadings of

Plaintiffs, which included these paragraphs of the Complaint.

1. F. Every plaintiff is adversely affected and aggrieved by the failure of the Defendants to implement and enforce each and all of the provisions of Measure 47.
 1. Each is adversely affected and aggrieved, because each supported Measure 47 and voted for Measure 47 yet see that is not being implemented.
 2. Each is adversely affected and aggrieved, because each is a participant in the political campaign process in Oregon whose influence is overwhelmed by the influence of the huge campaign contributions and independent expenditures by corporations, unions, other entities, and individuals, as documented by the legislative findings of fact in Section (1) of Measure 47.
2. Each plaintiff intends to remain an Oregon citizen, elector and taxpayer.

* * *

21. Plaintiffs Hazell et al. and other Oregon residents and electors are irreparably harmed by Defendants' refusal to administer and enforce the provisions of Measure 47 other than their incorrect interpretation of Section (9)(f).
 - A. They are harmed by deprivation of their right to enact legislation pursuant to the initiative process under Article IV of the Oregon Constitution.
 - B. They are harmed by the continuing undue influence of monied interests in all state and local political campaigns for public office, as documented in the legislative findings of fact set forth in Section (1) of Measure 47.
 - C. They are harmed by the continuing lack of timely disclosure and publication of information on the sources of money used by campaigns for state and local public office in Oregon, as documented in the legislative findings of fact set forth in Section (1) of Measure 47.

Paragraph 29 made similar allegations for the Horton Plaintiffs.

The Complaint incorporated all of the extensive and serious harm, expressed in § (1) of Measure 47, stemming from the absence of the limits on political campaign contributions and expenditures that Measure 47 would provide. Both the Hazell and Horton Plaintiffs alleged the suffering of harm and even irreparable harm due to Defendants' refusal to implement Measure 47. These allegations were not contested; nor were the legislative findings expressed in § (1) of Measure 47.

The relief sought by Plaintiffs included:

19. Pursuant to ORS 28.010 to 28.160, ORS 183.486(1), and ORS 246.910, *inter alia*, Plaintiffs Hazell et al. are entitled to, and hereby seek, a declaration that:
 - A. Each Defendant is obligated to administer and enforce each and all of the provisions of Measure 47.
 - B. Section (9)(f) does not authorize either Defendant to avoid administering and enforcing the provisions of Measure 47 other than Section (9)(f).
- * * *
22. Pursuant to ORS 28.080, ORS 183.486(1), ORS 183.490, and ORS 246.910, *inter alia*, Plaintiffs Hazell et al. are entitled to, and hereby seek, a order directing Defendants to administer and enforce all provisions of Measure 47.
30. Pursuant to ORS 28.080, ORS 183.486(1), ORS 183.490, and ORS 246.910, *inter alia*, Plaintiffs Horton and Lewis are entitled to, and hereby seek, a order directing Defendants to administer and enforce all provisions of Measure 47, except Section (9)(f).

WHEREFORE, Plaintiffs Hazell et al. pray for a judgment:

1. Declaring that:
 - A. The Secretary is obligated to administer and enforce each and all of the provisions of Measure 47.
 - B. The Attorney General is obligated to administer and enforce each and all of the provisions of Measure 47.
2. Ordering that the Secretary and Attorney General administer and enforce all provisions of Measure 47.

The above allegations and requested relief contradict the Court's conclusion that Plaintiffs did not "seek any specific relief connected to the application of nonapplication of the individual provisions in question." Plaintiffs expressly sought the relief of implementation of each and every of those provisions. And, as noted above, if Plaintiffs did not seek that relief clearly enough, the proper remedy is remand to the Circuit Court.

A. PLAINTIFFS MEET THE CONSTITUTIONAL TEST FOR JUSTICIABILITY.

Justiciability under Oregon Constitution, Article VII (original and amended), is limited only by the outer ambit of "judicial power." This Court has announced the outer boundaries of judicial power. Advisory opinions requested by other branches of government purely for guidance are not Constitutionally authorized [*Yancy v. Shatzer*, 337 Or 345, 355, 97 P3d 1161 (2004)], and judicial power does not extend to moot cases. *Id.*, at 337 Or at 363.

The Court here (352 Or at 468) references *Gortmaker v. Seaton*, 252 Or 440, 444, 450 P2d 547 (1969). Its holding was based on Article VII lack of

power to issue advisory opinions to other branches of government. Gortmaker, a District Attorney, was the nominal plaintiff seeking "clarification" for governmental action:

The only purpose of this admittedly 'friendly' litigation is to obtain an advisory opinion, in advance of executive action, concerning the effect of certain penal statutes and regulations.

Id., 252 Or at 442. There is a "strong precedent against advisory opinions." *Id.* 252 Or at 443.

There is also an Article III Constitutional limit on judicial power to the extent it seeks to advise another branch of government on powers exclusively within its purview. *Eacret v. Holmes*, 215 Or 121, 333 P2d 741 (1958), also cited by the Court (352 Or at 467), found it would violate separation of powers (Article III, § 1) to "advise" the Governor by declaring how to exercise his pardoning powers. 215 Or at 125, 126.

This case does not present a instance of mootness or the seeking of an advisory opinion by another branch of government (or by Plaintiffs, for that matter). The declarations and injunctions sought by Plaintiffs will not violate separation of powers. The questions are raised in litigation between parties with adverse interests in the outcome. A decision will have concrete effects on candidates, campaigns, voters, and the officers who must enforce the terms of Measure 47. It is within the judicial power of this Court to make those determinations. Only then can it decide whether § 9(f) shall operate to make dormant any terms the Court finds unconstitutional under Article I, § 8.

This Court has considered statutory justiciability in a number of contexts,

finding that the Legislature required present controversies (ripeness limitation on Declaratory Judgments) or had set high or low requirements for standing in different statutes. Implicit in the decisions is consideration of whether the relief sought would have a practical effect on the parties.

Since the adoption of the Oregon Constitution in 1857, this court, from time to time, has been required to determine whether a matter before it is one that is appropriate for judicial disposition. Historically, this court has described that undertaking as a determination whether a "justiciable controversy" exists. In that regard, this court has stated that "[a] controversy is justiciable, as opposed to abstract, where there is an actual and substantial controversy between parties having adverse legal interests." *Brown v. Oregon State Bar*, 293 Or 446, 449, 648 P2d 1289 (1982). Similarly, this court has observed that justiciability contemplates "that the court's decision in the matter will have some practical effect on the rights of the parties to the controversy." *Brunnett v. PSRB*, 315 Or 402, 405, 848 P2d 1194 (1993). Encompassed within the broad question of justiciability are a constellation of related issues, including standing, ripeness, and mootness.

Yancy v. Shatzer, 337 Or 345, 349, 97 P3d 1161 (2004).

We discuss the statutory bases for justiciability below. We note here that the Plaintiffs have framed their requests for relief to achieve far-reaching practical effect, meeting the fundamental test that the requested relief be within the judicial power of this court to consider.

Here, Plaintiffs sought a decree that the individual provisions of Measure 47 are constitutional. Such a decree would place each of those provisions in operation (even under the Court's view of § (9)(f)) and thus result in specific relief--the imposition of significant limits (and reporting and disclosure requirements) on political campaign contributions and expenditures in state and local candidate races in Oregon.

No one ever asserted in the instant cases that the relief sought by Plaintiffs would not have a practical effect on the parties. The practical effects would include:

1. foreclosing candidates from receiving most of the funds they now receive for their campaigns (all contributions from corporations and unions and all contributions from individuals in excess of \$500 in a statewide race or \$100 in a non-statewide race);
2. requiring candidates and committees to comply with extensive additional reporting and disclosure requirements applicable to campaign contributions and expenditures;
3. changing the method for adjudicating alleged violations of campaign finance laws.

Nor is a decision about the present enforceability of each term "advisory." A decision will have concrete effects on candidates, campaigns, voters (who receive messages funded by contributions and expenditures), and the officers who must enforce the terms of Measure 47. We agree with the analysis of Justice Durham, 352 Or at 479-81.

If anyone had raised a "lack of practical effect" argument, Plaintiffs would easily have shown the large effect of these limits, using databases such as those maintained by the National Institute on Money in State Politics (www.followthemoney.org), which show, for example, that all contributions in all Oregon state races in 2010 were \$77.3 million. Those in excess of \$500 per contribution amounted to \$70.0 million of that total.¹ It is indisputable that

1. Plaintiffs request official notice regarding these numbers, which are demonstrated on the attached spreadsheet containing data from the National Institute on Money in State Politics, accessed at

(continued...)

enforcement of the limitations of Measure 47 would have had a very substantial impact on political campaigns in Oregon, and no one disputed it.

A suit to declare an Act of the Legislature (by initiative) constitutionally valid and thus, under the terms of the Act, presently in effect has the same practical effect as a suit to declare an Act of the Legislature unconstitutional and thus not in effect. The outcome of the case determines what rules apply to the functions of commerce or politics (or anything else) in Oregon and thereby significantly affects the behavior of individuals and entities. The suit to declare the provisions constitutional place them into effect; the suit to declare the provisions unconstitutional removes them from effect. The reasoning of the majority would thus negate the opportunity for challenges to the constitutionality of statutes.

The Court states (352 Or at 468):

Because plaintiffs have failed to raise an actual controversy relating to the individual provisions of Measure 47, any attempted reexamination of this court's decision in *Vannatta I* as it relates to individual provisions of Measure 47 would be only advisory--a function this court cannot undertake.

Plaintiffs raised actual controversies relating to many individual provisions. We argued that the limits on contributions and expenditures are valid and listed a dozen other provisions on reporting, disclosure, and other requirements and asserted their validity. Resolving the constitutionality of each provision thus has a concrete and practical effect on candidates, committees, campaigns, and voters.

1.(...continued)

http://www.followthemoney.org/database/StateGlance/contributor_details.phtml?&s=OR&y=2010&summary=1

Instead of having no enforced limits on political contributions and expenditures in state and local races, Oregon would have among the most strict limits.

Instead of unfettered independent expenditures from sources that need not identify themselves in their advertising, every ad funding by independent expenditures would have to prominently disclose the top 5 contributors to the ad campaign, their primary businesses, and how much each had contributed to the campaign.

B. PLAINTIFFS' CLAIMS ARE JUSTICIABLE UNDER ORS 28.010, ET SEQ.

This case is justiciable under ORS 28.010 et seq., invoked in the Complaint. This Court has summarized the requirements for justiciability in the context of a declaratory judgment action as follows:

Justiciability is a vague standard but entails several definite considerations. A controversy is justiciable, as opposed to abstract, where there is an actual and substantial controversy between parties having adverse legal interests. The controversy must involve present facts as opposed to a dispute which is based on future events of a hypothetical issue. A justiciable controversy results in specific relief through a binding decree as opposed to an advisory opinion which is binding on no one. The court cannot exercise jurisdiction over a nonjusticiable controversy because in the absence of constitutional authority, the court cannot render advisory opinions."

Brown v. Oregon State Bar, 293 Or 446, 449, 648 P2d 1289 (1982) (citations omitted).

The Complaint seeks various declarations of law and the injunctive relief available under ORS 28.080. The instant cases present no less justiciable a controversy than that presented in *Pendleton School Dist. 16R v. State*, *supra*, where the Court found declaratory judgment to be available.

A plaintiff who claims a right or status that is affected by a statute is entitled to invoke the court's jurisdiction to "have determined any question of construction or validity arising under any such * * * statute * * * and obtain a declaration of rights, status or other legal relations thereunder." ORS 28.020.

The additional, mandatory relief sought by Plaintiffs is available under ORS 28.080, also invoked in the Complaint. Further, ORS 28.010 is available, if relief under the Administrative Procedures Act ("APA") is not available. See *Mendieta, et al. v. State of Oregon*, 148 Or App 586, 941 P2d 582 (1997), *review dismissed*, 328 Or 331, 987 P2d 510 (1999).²

This Court's most recent extended discussion of justiciability under the Declaratory Judgment Act is *Pendleton School Dist. 16R v. State*, *supra*, 345 Or at 605-06:

In *Brown*, the Attorney General had filed a declaratory judgment action in circuit court, challenging the Oregon State Bar's opinion that it would violate legal ethics rules for the Attorney General to give legal advice ex parte to an agency director and hearings officer in a contested case (the Attorney General, in fact, had given legal advice under those circumstances). This court concluded that the matter was justiciable * * *.

Similarly, in *Savage v. Munn*, 317 Or 283, 856 P2d 298 (1993), the plaintiffs had contended that Ballot Measure 5 (1990), which became Article XI, section 11b, of the Oregon Constitution, violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. This court concluded that the matter was justiciable:

"Plaintiffs here are complaining of the manner in which their taxes are capped under Measure 5. The workings of Measure 5 are 'present facts,' not simply possible future events. A binding decree would have the effect of invalidating the proportional reduction scheme contained in [Measure 5]. Such an outcome

2. We discuss relief available under the APA below.

would hardly be an advisory opinion."

Id. at 292, 856 P2d 298 (omitted). This court added that, while the record was not clear, "it appears that, at least as to Lear [one of the plaintiffs], Measure 5 has had some cognizable effect." Id. at 292 n. 6, 856 P2d 298.

We conclude that both *Brown* and *Savage* are analogous to the situation here, and they establish that the present matter is justiciable. The issue whether Article VIII, section 8, imposes a duty on the legislature to fund the public school system at a specified level every biennium presents a set of present facts regarding the interpretation of a constitutional provision; it is not simply an abstract inquiry about a possible future event. See *Savage*, 317 Or at 292, 856 P2d 298 ("The workings of Measure 5 are 'present facts,' not simply possible future events."); *Brown*, 293 Or at 450, 648 P2d 1289 ("present facts" were "plaintiff's existing statutory duty" in particular factual context). Compare *Tillamook*, 302 Or at 413, 730 P2d 1214 (matter not justiciable when parties sought declaratory judgment to prohibit speculative future legislation, as that would be advisory opinion).

The relief sought by Plaintiffs here would have more practical effect on Oregon than the relief sought in *Brown*, *Savage*, or *Pendleton School Dist. 16R*.

Eacret v. Holmes, *supra*, is cited by the Court for the proposition that a "complaint fails to state a justiciable controversy under declaratory judgment act where plaintiffs requested no relief except that court declare what the law is." 352 Or at 467-8. That case hinged not on the nature of the declaration (what does the law mean in a particular situation) but on the fact that the plaintiffs lacked standing to seek the declaration. The parents of a murder victim sought a declaration to prevent the Governor from commuting the death penalty for the convicted killer. Regardless of the personal emotional involvement of the parents, punishment for crimes is a matter of public right and the affected family had "no right, status, or legal relation" to distinguish them from others in the public. 215 Or at 125. This Court also found it would violate separation of

powers (Article III, § 1) to "advise" the executive on his pardoning power. *Id.*, at 124, 126.

Plaintiffs here pled (without objection) their particular interests in the enforcement of the terms of Measure 47, as Chief Petitioners, proponents of the measure, and past elected office-holders. If necessary, Plaintiffs could have additionally pleaded facts about their past candidacies for public office, as well as their prospective future candidacies that would subject them (and their opponents) directly to the provisions of Measure 47. There was no reason for them to do so, however, as their standing was not an issue. The only discussion of standing in the trial court's opinion was its conclusion that the Intervenor-Defendants had standing to bring their claims under ORS 28.010 et seq.

TVKO v. Howland, 335 Or 527, 535, 73 P3d 905 (2003), cited by this Court, supports Plaintiffs in their request for opportunity to amend their pleadings. TVKO telecast pay-per-view boxing matches. It sought a declaratory ruling that Oregon's gross receipts tax was unconstitutional. All the potential Oregon tax liability it incurred arose from revenue generated from televising out-of-state events. The Oregon Tax Court found that Oregon taxation of revenue generated from out-of-state events unconstitutional but declined to consider total invalidity of Oregon's gross receipts tax on the factual record before it, as there was no evidence there ever were any Oregon boxing bouts which had been taxed. The Supreme Court approved narrowing the Constitutional challenge "as applied" to revenue from out-of-state events. The narrowing of the controversy in *TVKO* is not particularly relevant here. TVKO

and Plaintiffs herein did present a justiciable controversy.

TVKO then sought to expand the scope of the ruling to all events and failed to show evidence of any practical effect of such an expanded ruling. Here, Plaintiffs have cited numerous significant practical effects of the rulings they seek and have had no opportunity to present any evidence or replead. They are not seeking a declaration about the constitutional validity of taxes that have never been imposed.

C. THE COURT HAS JURISDICTION TO HEAR CLAIMS BROUGHT BY PLAINTIFFS WITH STATUTORY STANDING.

The Court in *Kellas v. Department of Corrections*, 341 Or 471, 145 P3d 139 (2006), clarified that justiciability can be conferred by statute.

The state now petitions this court for review of the Court of Appeals decision. The state argues that the legislature lawfully may authorize any person to seek judicial review to challenge the validity of a governmental action, such as an administrative rule, without a showing that the governmental action or the court's decision will have a practical effect on that person's individual rights or interests. We granted review and, for the reasons expressed below, conclude that, at least within the context of the present controversy, the state's argument is correct.

* * *

As noted, ORS 183.400(1) provides that "[t]he validity of any rule may be determined upon a petition by *any person* to the Court of Appeals[.]" (Emphasis added [by the Court].) The statute imposes no additional qualification for standing in this context.

The legislature's policy choice regarding standing in ORS 183.400(1) is unambiguous. The legislature intends by the statute to authorize any person to invoke the judicial power of the court to test the validity of every administrative rule under existing statutory and constitutional law and, thus, to advance the objective that all agency rulemaking shall remain within applicable procedural and substantive legal bounds. So understood, petitioner satisfies the standing

requirement that ORS 183.400(1) identifies. The remaining question is whether some other source of law--in this case, the Oregon Constitution--imposes any additional requirement or limitation regarding a party's standing to challenge an administrative rule. * * *

The lawmaking authority of Oregon's legislature under the Oregon Constitution is plenary, subject only to limits that arise either from the Oregon Constitution or from a source of supreme federal law. We are aware of no qualification on the legislature's authority in the Oregon Constitution that would restrict the legislature from authorizing any member of the public to initiate litigation concerning the validity of administrative rules under a statute such as ORS 183.400(1).

Kellas, 341 Or 471 at 476-78 (reversing *Utsey v. Coos County*, 176 OrApp 524, 32 P3d 933 (2001)).

There are several statutes that enable Plaintiffs to pursue justiciable claims in the instant cases.

1. ORS 246.910.

The Court recognizes that Plaintiffs are entitled under ORS 246.910 to challenge actions or inactions of the officials responsible for implementation of Measure 47. 352 Or at 467. The Court does not explain why, under that statute, justiciability is somehow limited to only the inquiry about § (9)(f) and not to the constitutionality of the other "individual provisions of Measure 47." After all, § (9)(f) itself is only an "individual provision of Measure 47." The Court does not explain why it is different, for purposes of justiciability, from all of the other individual provisions.

ORS 246.910 provides:

Appeal from Secretary of State, county clerk or other elections official to courts; deadline for filing.

(1) A person adversely affected by any act or failure to act by the Secretary of State, a county clerk, a city elections officer or any other county, city or district official under any election law, or by any order, rule, directive or instruction made by the Secretary of State, a county clerk, a city elections officer or any other county, city or district official under any election law, may appeal therefrom to the circuit court for the county in which the act or failure to act occurred or in which the order, rule, directive or instruction was made.

ORS 246.910(1) clearly contemplates that the plaintiff can challenge Defendant's "failure to act," and the obvious remedy (sought here by Plaintiffs) is a court order directing Defendant to take the legally-required action.

Here, the legally-required action is to implement all of the provisions of Measure 47, until and unless each of them is determined to be unconstitutional by the courts. No court has found any individual provision of Measure 47 to be unconstitutional.

2. ORS 183.484 AND ORS 183.490.

Plaintiffs also sought relief pursuant to ORS 183.484 and ORS 183.490.³ ORS 183.490 is a statute, like ORS 246.910, that affords justiciability of actions brought to require government officials to enforce duly-enacted laws. ORS 183.490 provides:

183.490 Agency may be compelled to act. The court may, upon petition as described in ORS 183.484, compel an agency to act where

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3. Actions and inactions by the Secretary of State and/or Attorney General are subject to review under ORS 183.484 and ORS 183.490. The exemption in ORS 183.315(8) applies only to proceedings conducted under rules adopted by the Secretary of State under ORS 246.190, not applicable here. ORS 183.635(2) exempts the Attorney General from using administrative law judges assigned from the Office of Administrative Hearings for its contested cases but indicates that the Attorney General is considered an "agency" under the APA,

it has unlawfully refused to act or make a decision or unreasonably delayed taking action or making a decision.

Plaintiffs' Complaint (see pages 5-8 above) invoked ORS 183.484 and ORS 183.490 and sought the remedies afforded by ORS 183.486(1), which include:

- (a) Order agency action required by law, order agency exercise of discretion when required by law, set aside agency action, remand the case for further agency proceedings or decide the rights, privileges, obligations, requirements or procedures at issue between the parties; and
- (b) Order such ancillary relief as the court finds necessary to redress the effects of official action wrongfully taken or withheld.

Plaintiffs sought an order requiring Defendants to take "action required by law," the implementation of Measure 47. See Measure 47 §§ (8), (10)(a).⁴ ORS 183.490 has been invoked dozens of times by plaintiffs seeking to compel government actors to take action required by law. See, e.g., *Public Employees' Benefit Board v. Oregon Health and Sciences University*, 205 Or App 64, 132 P3d 1061, *review denied*, 341 Or 579, 146 P3d 884 (2006). A petition under ORS 183.490 and ORS 183.484 can be brought by anyone who states facts showing how the petitioner is adversely affected or aggrieved by the agency order (or by the agency's refusal to act in compliance with law). ORS 183.484(3). Plaintiffs alleged such facts, which were not contested.

4. Plaintiffs herein would have brought this action against Defendants also under the mandamus statute, but for *Mongelli v. Oregon Life and Health Guar. Ass'n*, 85 OrApp 518, 522-33,737 P2d 633 (1987), which held that mandamus under ORS chapter 34 is not available when petitioners "have a remedy under the APA."

D. MEASURE 47 §§ (9) AND (11) PROVIDE FOR JUDICIAL REVIEW OF THE CONSTITUTIONALITY OF THE INDIVIDUAL PROVISIONS OF MEASURE 47.

Section (9)(f) itself provides for judicial review of the constitutionality of the individual provisions of Measure 47. Section (9)(f) reads:

If, on the effective date of this Act, the Oregon Constitution does not allow limitations on political campaign contributions or expenditures, this Act shall nevertheless be codified and shall become effective at the time that the Oregon Constitution is found to allow, or is amended to allow, such limitations.

This section clearly contemplates that the courts are to examine the limitations imposed by Measure 47 and to find whether they are constitutional.

In addition, § (11) requires that constitutionality shall be determined separately for each "section, subsection, and subdivision" of Measure 47. Thus, §§ (9)(f) and (11) themselves provide for judicial review of the individual provisions of Measure 47 and require that each individual provision be evaluated separately.

Dated: January 18, 2013

Respectfully Submitted,

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

Length of Petition for Reconsideration

I certify that (1) the foregoing Petition for Reconsideration complies with the word-count limitation of ORAP 9.05(3)(a) and (2) the word count of this Petition for Reconsideration as described in ORAP 5.05(2)(a) is 4985 words.

Type Size

I certify that the size of the type in this Petition for Reconsideration is not smaller than 14 point for both the text and footnotes as required by ORAP 5.05(4)(f).

Dated: January 18, 2013

/s/ Linda K. Williams

Linda K. Williams

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I FILED the original PETITION FOR RECONSIDERATION OF THE HORTON PLAINTIFFS by Efile this date and further that I SERVED it by Efile on the parties listed in No. S059245. I SERVED it also by emailing a true copy to each counsel below.

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