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 nonprofit corporation, and FRED VANNATTA,
Intervenors-Respondents, Cross-Appellants,
Respondents on Review.

Court of Appeals A137397

Supreme Court S059245 (control) S059246

REPLY BRIEF ON REVIEW OF ALL PETITIONERS ON REVIEW (HAZELL PETITIONERS AND HORTON PETITIONERS)

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LINDA K. WILLIAMS
OSB No. 78425
10266 S.W. Lancaster Road
Portland, OR 97219
(503) 293-0399 voice
(866) 795-7415 fax
linda@lindawilliams.net

Attorney for Petitioners on Review
Joan Horton and Ken Lewis

DANIEL W. MEEK
OSB No. 791242
10949 S.W. 4th Avenue
Portland, OR 97219
(503) 293-9021 voice
(866) 926-9646 fax
dan@meek.net

Attorney for Petitioners on Review
Bryn Hazell, Francis Nelson, Tom Civiletti, David Delk, and Gary Duell

(attorneys continued on following page) December 2011

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

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

ERIC C. WINTERS
OSB No. 983790
30710 S.W. Magnolia Avenue
Wilsonville, OR 97070
eric@ericwinters.com

Attorney for Amicus Curiae, The Better Government Project

P.K. RUNKLES-PEARSON
OSB No. 061911
Stoel Rives LLP
900 S.W. 5th Avenue, Suite 2600
Portland, OR 97204
(503) 224-3380
pkrp@stoel.com

Attorney for Amicus Curiae, ACLU Foundation of Oregon

JOHN R. KROGER
OSB No. 077207
Oregon Attorney General
(503) 378-4400 (voice)
MARY WILLIAMS
OSB No. 911241
Solicitor General
(503) 378-4402 (voice)
(503) 378-6306 (fax)
Oregon Department of Justice
CECIL RENICHE-SMITH
OSB No. 961479
Assistant Attorney General
MICHAEL CASPER
OSB No. 062000
Assistant Attorney General
Oregon Department of Justice
1162 Court Street N.E.
Salem, OR 97201-4096
cecil.a.renichesmith@doj.state.or.us
michael.casper@doj.state.or.us

Attorneys for Respondents on Review, Cross-Respondents, Defendants-Respondents Kate Brown and John Kroger

JAMES NICITA
OSB No. 024068
302 Bluff Street
Oregon City, OR 97045
(541) 578-0467
james.nicita@gmail.com

Attorney for Amicus Curiae, Elizabeth Trojan and Fair Elections Oregon

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I. STATEMENT OF THE CASE.

The Brief on the Merits of Respondents on Review, Kate Brown, Secretary of State, and John R. Kroger, Attorney General [hereinafter "State's Brief" or "Defendants"], p. 1, offers the sweeping generalization that ***Vannatta v. Keisling***, 324 Or 514, 931 P2d 770 (1997) ("***Vannatta 1***") "held * * * that laws placing limits on CC&Es were unconstitutional." ***Vannatta I*** held that certain sections of Measure 9 of 1994 violated Article I, § 8. Whether any part of Measure 47 is unconstitutional requires examining the sections of Measure 47 itself. Courts rule on cases that are presented and do not generically, preemptively "unconstitutionalize" later statutes.

Defendants (p. 4) refer to the "categorical holding in [***Vannatta I***]" without identifying the holding. That critical holding in ***Vannatta I*** (unique in America to that case) was that campaign **contributions** are protected "expression." ***Vannatta v. Oregon Government Ethics Com'n***, 347 Or 449, 222 P3d 1077 (2009), cert den, --- US ---, 130 SCt 3313, 176 LEd2d 1187 (2010) ("***Vannatta II***"), then expressly abrogated that holding. See Opening Brief on Review of Petitioners Bryn Hazell, Francis Nelson, Tom Civiletti, David Delk, and Gary Duell [hereinafter "Hazell OBR"], pp. 22, 39-47, 56.

Defendants (p. 2) claim § (9)(f) calls for Measure 47 to be "dormant and thus insulated from a constitutional challenge." There is no support for that conclusion (or for Defendants' similar assertions at pp. 5, 44). It is contradicted by § (9)(f) itself, which calls for the Act to be operative "at the time that the Oregon Constitution is found to allow * * * such limitations." That finding

requires judicial consideration of the constitutionality of Measure 47's provisions, not insulation from constitutional challenge.

It is sometimes difficult to know whether Defendants are supporting the Court of Appeals's resolution of an issue or not, as Defendants do not quote anything from the Court of Appeals opinion.

The Hazell OBR (pp. 5-6) noted that the Chief Petitioners sought to avoid invoking ***Smith v. Cameron***, 123 Or 501, 262 P2d 946 (1928), which held that a later amendment to the Oregon Constitution did not revive a statute held to be unconstitutional at the time of enactment. Defendants (p. 18) confirm the potential impact of ***Cameron*** and that drafters needed a prophylactic such as § (9)(f) in order for Measure 47 to be activated, if necessary, by a later constitutional amendment. Defendants now argue the drafters' precaution thwarts their own intent and that they created an entirely null statute--not in operation and not capable of being activated, even if its provisions are found constitutional.

II. PLAINTIFFS' CLAIMS ARE JUSTICIABLE.

Defendants raise issues of justiciability (at pp. 5, 21, 39-42) for the first time:

> A declaratory action in which a party asks this court to cause such an event to occur by revisiting and reversing an earlier case in the absence of any need to do so does not present a justiciable controversy.

Petitioners request is not that this Court "reverse an earlier case" *per se*. It is that the Court review the substantive provisions of Measure 47 for validity,

pursuant to ORS 183.484(1), ORS 246.910, and ORS 28.010. The "need" is for review of Measure 47 itself. It is Defendants who insist that § (9)(f) requires this Court to somehow "reverse" ***Vannatta I*** (regarding an different statute) in the abstract, without considering the substantive provisions of Measure 47. Plaintiffs ask only for determinations of law regarding the validity of Measure 47 and Defendants obligations to implement it.

A case is "justiciable" when a court has jurisdiction to hear the request for relief, the parties' interests are adverse, and "the court's decision in the matter will have some practical effect on the rights of the parties to the controversy." ***Brumnett v. PSRB***, 315 Or 402, 405-06, 848 P2d 1194 (1993).

> [I]n ***Marbet [v. Portland Gen. Elect.***, 277 Or 447, 453-457, 561 P2d 154 (1977)], this court held the case to be justiciable even though its decision would have a practical effect only on the respondent, PGE, and not on the petitioner * * *.

Kellas v. Department of Corrections, 341 Or 471, 476, 145 P3d 139 (2006).

The Answering Brief on the Merits of Intervenor-Respondents, Cross-Appellants and Respondents on Review [hereinafter "Intervenors"], pp. 31-32, introduces new argument about lack of a "case or controversy."

> The Oregon Constitution contains no "cases" or "controversies" provision. * * * [W]e cannot import federal law regarding justiciability into our analysis of the Oregon Constitution and rely on it to fabricate constitutional barriers to litigation with no support in either the text or history of Oregon's charter of government.

Kellas, 341 Or at 471.

> Defendants (p. 41) admit:
>
> The state also agrees that if this court were to overturn [***Vannatta I***] and ***Meyer***, the effect of such a ruling would be to make Measure 47 operative.

First, the function of the Court is to review the provisions of the statute at issue, Measure 47, not merely to "overturn" previous cases in the abstract. Second, the way earlier cases are overturned is by examining them as they apply to the current case, the validity of the provisions of Measure 47. It appears Defendants believe that confirming the validity of Measure 47's substantive provisions would require "overturning" the earlier cases, although we have extensively shown why:

1. Overturning is not necessary (Hazell OBR, pp. 47-53; Hazell Opening Brief, pp. 29-30; Better Government Project (BGP) Amicus Brief, pp. 1-14; Trojan/FEO Amicus Brief, pp. 2-10).[1]

2. Overturning is warranted (Hazell OBR, pp. 53-58; Hazell Opening Brief, pp. 30-49; Horton OBR, pp. 32-59; Horton Opening Brief, pp. 20-49; Horton Reply Brief, pp. 9-14)

3. The critical holding in ***Vannatta I*** was overturned, in ***Vannatta II*** ((Hazell OBR, pp. 39-47)

In ***Strunk v. Public Employees Retirement Board***, 338 Or 145, 154, 108 P3d 1058 (2005), plaintiffs did not want the statute to be enforced, and PERB had agreed (pursuant to a settlement) not to enforce it. Thus, no harm to plaintiffs. Here, conversely, Plaintiffs do want the statute to be enforced, but Defendants refuse. See Hazell Reply Brief, p. 7, on this precise point.

Brown v. Oregon State Bar, 293 Or 446, 450, 648 P2d 1289 (1982), found: "The controversy involves present facts, the plaintiff's existing statutory duty."

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1. We refer to the Opening Briefs on Review as "OBR" and the briefs at the Court of Appeals as "Opening Brief" or "Reply Brief" or "Amicus Brief."

> In this case, declaratory relief is particularly appropriate to determine the statutory duties of a public officer. ***Recall Bennett Comm. v. Bennett et al.***, 196 Or 299, 249 P2d 479 (1952); ***State ex rel Dental Ass'n. v. Smith***, 201 Or 288, 270 P2d 142 (1954).

Id., 293 Or at 451. The same is true here, where Plaintiffs also seek declaratory relief "to determine the statutory duties of a public officer" to enforce duly-enacted and valid statutory provisions.

Defendants (p. 11) question justiciability by labeling the harms to citizens and voters resulting from surprise activation of the dormant measure (asserted by the Horton Plaintiffs) as "speculative" and "not ripe." Ripeness refers to that aspect of justiciability requiring there be practical relief from harm that a court may grant [***Brumnett v. PSRB***, *supra*], and ripeness is "an actual, as opposed to hypothetical, injury * * *." ***Coast Range Conifers v. Board of Forestry***, 192 OrApp 126, 129, 83 P3d (2004), *rev'd other grounds*, 339 Or 136 (2005). Plaintiffs have shown present injury, non-hypothetical harm from Defendants' conduct. Moreover, the claim that lawmakers cannot currently insert hidden contingencies that may later activate a dormant law is presently "ripe." If resolved in favor of the Horton Petitioners, then § (9)(f) must be stricken, in accordance with the § (11) severability clause, thus placing all substantive provisions of Measure 47 into operation. Plaintiffs currently suffer the harm of non-enforcement of a duly-enacted statute and other harms set forth, without dispute, at Complaint ¶¶ 1, 15, 21, 29. Striking § (9)(f) now as unconstitutional provides immediate relief.

Defendants (p. 18) argue:

> Because the entire measure is suspended and unenforceable, the

> question of the constitutionality of its individual provisions and, by extension, the severability of individual provisions is not ripe for review. Even if this court were to rule that a particular provision in Measure 47 was constitutional, the Act would still be in abeyance.

This argument depends upon the accepting Defendants' arguments about § (9)(f) and conflates justiciability with the merits. It also has the logical flaw that if "the entire measure is suspended," then § (9)(f) is also suspended. See Hazell OBR, pp. 36-38.

Defendants (pp. 39-40) state:

> Even if this court were to rule that a particular provision in Measure 47 was constitutional, the Act would still be in abeyance. Thus, any ruling by this court would be merely advisory.

There is no explanation for this statement. If any substantive term in Measure 47 were found to be constitutional, § (9)(f) would make it operative. This would not cause Measure 47 to remain in abeyance.

A. ORS 246.910(1).

ORS 246.910(1) is "obviously remedial and should be liberally construed." ***Columbia River Salmon & Tuna Packer Assoc. v. Appling***, 232 Or 230, 236, 375 P2d 71 (1962). The Legislature's power to grant standing is plenary. ***Kellas***, 341 Or at 418. Here it has conferred standing upon Plaintiffs, "adversely affected" by Defendant's acts under elections laws.

B. ORS 28.020.

Plaintiffs have standing under ORS 28.020 to seek a declaration that Defendants are not following the law and that any or all of the provisions of Measure 47 are valid (constitutional) and in force.

> The Declaratory Judgment Act expands the jurisdiction of courts to include those cases where the petitioner's "rights, status or other legal relations" are affected by the challenged enactment. ORS 28.010. The act is to be liberally construed, ORS 28.120. No actual wrong need be committed or loss incurred in order to invoke declaratory relief.

Gaffey v. Babb, 50 OrApp 617, 621, 624 P2d 616, *review denied*, 291 Or 117, 631 P2d 341 (1981). Jurisdiction exists where "judgment will terminate the controversy or remove an uncertainty" [ORS 28.050] and the purpose is to "afford relief from uncertainty and insecurity." ORS 28.120.

Standing has been denied only when the injury is "too speculative or entirely missing." ***Vannatta II***, *supra*, 347 Or at 470. Plaintiffs interests are concrete (many were Measure 47's Chief Petitioners), as shown by the facts alleged in the Complaint, uncontested by Defendants.

III. REPLY OF HAZELL PETITIONERS.

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

1. THE TEXT OF § (9)(f) SHOWS THAT "SUCH LIMITATIONS" REFERS TO THOSE IN MEASURE 47 ITSELF.

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.

Defendants and Intervenors do not refute the Hazell OBR (pp. 18-24) demonstration that "such limitations" in § (9)(f) means the "limitations on political campaign contributions or expenditures" in Measure 47 itself.

Defendants merely repeat many times that "such limitations" somehow refers to either the specific limitations of Measure 9 of 1994 struck down in ***Vannatta I*** or some amorphous "category" of similar limitations.[2] Defendants (p. 3) contend:

> The text, context, and history of Measure 47 demonstrate that the phrase "limitations on political campaign contributions or expenditures" refers not to the specific limitations contained in Measure 47 but rather to the category of limitations that this court struck down in [***Vannatta I***].

Defendants thereafter repeatedly assert that the phrase "limitations on political campaign contributions and expenditures" refers to some sort of general concept of limitations, divorced from Measure 47 but somehow tied to the Measure 9 of 1994 limitations struck down in ***Vannatta I***.[3] This makes no sense. Why would the drafters of Measure 47, in light of ***State v. Hecker***, 109 Or 520 (1923) ("***Hecker***") and ***Cameron***, establish a condition tied to the constitutionality of limitations other than the limitations in their own measure?

Also, Defendants cannot explain why their position at trial was completely opposite: They stated: "'limitations on campaign contributions and expenditures' [in § (9)(f)] refers to the Act's numeric limits on CC&E amounts." See Hazell OBR, p. 20. There is no dispute that "the Act" (actually "this Act") in § (9)(f) refers to Measure 47, not some other law.

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2. This requires examination of Measure 9, presented in the Reply Appendix.

3. Defendants also repeatedly (13 times in pp. 25-37, for example) misquote § (9)(f) as referring to "contributions and expenditures," but § (9)(f) refers to "contributions or expenditures."

Defendants (p. 6, and pp. 30, 35, 36) newly claim that the findings or amendment necessary to activate Measure 47's substantive limitations must have occurred before December 7, 2006.

Thus, Defendants offer a spurious "§ (9)(f)," one that necessarily includes added language (italicized):

> 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 *prior to December 7, 2006*, that the Oregon Constitution is found to allow [*by the Oregon Supreme Court in abrogating* ***Vannatta v. Keisling****, 324 Or 514, 931 P2d 770 (1997)*], or is amended to allow, such limitations [*as were enacted by voters as Measure 9 of 1994 and struck down in* ***Vannatta v. Keisling***].

That "§ (9)(f)" was not adopted by voters.

2. THE CONTEXT SHOWS THAT "SUCH LIMITATIONS" IN § (9)(f) REFERS TO THOSE IN MEASURE 47 ITSELF.

As context for § (9)(f), Defendants (pp. 25-26) finally address § (1)(r):

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

Defendants (p. 26) argue:

> In other words, section 1(r) and § (9)(f) of Measure 47, read together, assume that a change to the constitution, or a decision by this court overruling [***Vannatta I***] was the necessary precondition before Measure 47 would become operative. The context demonstrates that "limitations on political campaign contributions and expenditures" refers to the limitations struck down in [***Vannatta I***].
>
> How that conclusion can be derived from the language of § (1)(r) and §

(9)(f) is a mystery. The Hazell OBR, pp. 18-21, demonstrates § (1)(r) is a cogent explanation of the function of § (9)(f)--to make the Act operative "when the Oregon Constitution does allow **the limitations contained in this Act**," which can occur under § (9)(f) either:

(1) when "the Oregon Constitution is found to allow * * * such limitations" or

(2) when "the Oregon Constitution * * * is amended to allow such limitations."

Together, §§ (9)(f) and (1)(r) leave no doubt that "such limitations" refer to the limitations in Measure 47 itself--"the limitations contained in this Act."

Defendants (p. 26) then claim that "limits" must refer to "amounts of CC&Es," without explaining why that would matter.

Defendants (pp. 34-35) again present a view of § (1)(r) that makes no sense and contradicts its plain language. Defendants (p. 34) try to address § (1)(r) out of its own context with § (9)(f), trying to limit it to whether the Oregon Constitution is amended to allow such limitations. But § (1)(r) refers to "when the Oregon Constitution does allow the limitations contained in this Act," which can occur, as § (9)(f) recognizes, either when the Constitution or amended or is "found to allow * * * such limitations."

3. LEGISLATIVE HISTORY DOES NOT SUPPORT DEFENDANTS.

Defendants (pp. 24-31) seek to introduce "context" which actually consists of legislative history material not about Measure 47 but about Measure 46 (2006). They cite ***Ecumenical Ministries v. Oregon State Lottery Comm***., 318

Or 551, 559, 871 P2d 106 (1994), to claim that the non-enacted Measure 46 is somehow "context" for the provisions of Measure 47. First, ***Ecumenical Ministries***, 318 Or at 562, stated that another measure **enacted** at the same time would be context, not a measure than was **not enacted**. We know of no judicial opinion ever concluding that provisions of a non-enacted initiative measure are "context" for an enacted measure.[4]

Second, the proposition that Defendants claim is established by the existence of Measure 46 is immaterial. Defendants (p. 27) claim:

> The fact that Measure 46 was submitted to the voters at the same time as Measure 47, with its language referring to the unconstitutionality of CC&E limits, strongly indicates an assumption on the part of the voters that, if Measure 46 did not pass, the limits proposed by Measure 47 would be unconstitutional.

First, the constitutionality of a measure is not determined by what voters might have thought about its constitutionality. Second, there is no evidence that voters expected anything but the normal processes of government, under which an enacted statute is strongly presumed to be valid and constitutional and is subject to judicial review. See Hazell OBR, pp. 9-10. Third, using the same alleged "fact" cited by Defendants, we suggest that voters "strongly indicated" they preferred Court review of the constitutionality of Measure 47 by enacting it, despite the claims of unconstitutionality. Fourth, while is no extrinsic evidence regarding voter knowledge of § (9)(f), their desire for judicial review of the

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4. Intervenors (p. 20) err in citing ***Coultas v. City of Sutherlin***, 318 Or 584, 590, 871 P2d 465 (1994), which also dealt with "other provisions in the constitution that were adopted at the same time," not measures that were defeated (such as those upon which Intervenors rely, Measure 40 of 2006 and Measure 38 of 1996).

constitutionality of the provisions of Measure 47 is also shown by the phrase "is found to allow," which certainly contemplated judicial review of the Act's limitations for constitutionality.

As for the statement in Measure 46's ballot title (written by Defendant Attorney General), the constitutionality of a measure is not determined by a statement in the ballot title of another, non-enacted measure. Further, this Court does not litigate the substantive constitutionality of a measure in ballot title review and will not issue an advisory opinion at such time. ***Foster v. Clark***, 309 Or. 464, 469, 790 P.2d 1 (1990); ***Boytano v. Fritz***, 321 Or 498, 501, 901 P2d 835 (1995). There was no reason for Chief Petitioners to risk significant, indefinite delay in collecting signatures on Measure 46 by demanding Supreme Court review of the ballot title on purely academic grounds.

Defendants (p. 28) then offer an incorrect summary of ***Vannatta I***. That opinion did not hold "that laws which limited [political campaign contributions] were unconstitutional." ***Vannatta I*** held that certain provisions of one law, Measure 9 of 1994, were unconstitutional. Determining whether the provisions of Measure 47 are unconstitutional requires careful examination of its own provisions. We have demonstrated at length that (1) the principles of ***Vannatta I*** would not invalidate the provisions of Measure 47 and (2) ***Vannatta I*** should be further reconsidered, a process begun in ***Vannatta II***, *supra*, and ***State v. Moyer***, 348 Or 220, 230, 230 P3d 7, *cert denied*, --- US ---, 131 SCt 326, 178 LEd2d 146, 2010 WL 2988586 (2010).

Defendants ten times cite the *dicta* in ***Meyer v. Bradbury***, 341 Or 288, 142

P3d 1031 (2006), which we addressed at Hazell OBR, pp. 21, 51-52. ***Meyer*** was a "separate amendment" challenge to Measure 46, where no party argued that ***Vannatta I*** did or did not apply to the specific provisions of Measure 47. Defendants' (p. 28-29) quotation from ***Meyer*** (presumably the best one available) disproves its contention: "legislatively imposed limitations on individual political campaign contributions and expenditures [are] impermissible." Hazell OBR (pp. 51-52) shows that Measure 47 contains valid and severable limits on non-individuals. This is one of the reasons that Measure 47 is constitutionally different than Measure 9 of 1994.

Defendants (pp. 29-30) then proceed to alleged legislative history, again referring mainly to materials about Measure 46, not Measure 47. All the quotations show is that some proponents of campaign finance reform readily admitted that the statutory provisions of Measure 47 would be subject to review for constitutionality and might not survive.

Defendants (p. 5) claim (for the first time) that "voters relied on this court's pronouncements in [***Vannatta I***] in determining whether to vote for Measure 47" (similar at p. 7). It appears Defendants are arguing that those who voted for Measure 47 really did not mean it, because someone in a Voters' Pamphlet argument said it would be unconstitutional. Such statements are easily planted by an opponent "for a fee to have a point of view published" and are "an uncertain basis on which to determine the intended meaning of statutes." ***State v. Allison***, 143 OrApp 241, 253 P2d 1224, *review denied*, 324 Or 487, 930 P2d 852 (1996). Defendants (pp. 29-30) cite Voters Pamphlet arguments, some

by a Chief Petitioner and some not. These are not considered reliable, being merely "partisan viewpoints [that] shed little or no light on the voters' intention in approving a measure." ***Deras v. Myers***, 327 Or 472, 482, 962 P2d 692 (1998) (J. Durham, dissenting).

> [T]he courts view statements of support or opposition--which may be purchased by anyone with sufficient interest and cash--with some suspicion.

J. Landau, *Interpreting Statutes Enacted by Initiative: An Assessment of Proposals to Apply Specialized Interpretive Rules*, 34 WILLAMETTE L REV 487, 498 (1998). See Horton Reply Brief, pp. 38-42; Hazell Plaintiffs Surreply Memorandum Supporting Summary Judgment for Plaintiffs, pp. 11-12 [OJIN No. 37]; Hazell Plaintiffs Memorandum Opposing Summary Judgment for Defendants and Intervenors, pp. 11-14 [OJIN No. 30]. Defendants also cite a blog with no showing that it was read by anyone at the relevant time.

Defendants (p. 30) then illogically leap from claiming voters knew Measure 47's limitations might be found unconstitutional to concluding that voters "understood and intended the § (9)(f) phrase 'limitations on political campaign contributions and expenditures' to refer to limitations on CC&E's of the kind that were struck down in [***Vannatta I***]." There is not a single word about § (9)(f) in any part of the Voters' Pamphlet, apart from the printed text of Measure 47. See Reply App-2-24.[5] If § (9)(f) does not refer to the limitations of Measure 47 itself, what does it refer to? Defendants' position is that it refers

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5. Also available at http://www.sos.state.or.us/elections/nov72006/guide/meas/m47.html.

to limitations akin to those in Measure 9 of 1994 struck down in ***Vannatta I***. Thus, the constitutional amendment making Measure 47 operative would, according to Defendants, have to be an amendment to allow the limitations in Measure 9 of 1994. This makes no sense.

Defendants (p. 31) misstate Plaintiffs' position as claiming that § (9)(f) "place[d] the act in abeyance only if the limitations specified in Measure 47 were unconstitutional." To the contrary, Plaintiffs contend § (9)(f) places its Measure 47's limitations in abeyance until the Oregon Constitution is found or is amended to allow them. Finding a limitation to be constitutional puts it into operation, not into dormancy. Defendants (pp. 32-34) then repeat their earlier arguments without supplying new reasoning or evidence.

Defendants (p. 35) claim "the triggering circumstance intended by the voters was the fact that the constitutional prohibitions set forth in [***Vannatta I***] had not been abrogated." First, Defendant does not explain why such abrogation had to occur prior to the November 2006 vote. Second, what does "abrogated" mean? The crux of ***Vannatta I*** (that making a contribution "expression") has already been abrogated in ***Vannatta II***. Third, ***Vannatta I*** had many holdings. Which one(s) must be abrogated? How could several be abrogated, unless somehow Measure 9 of 1994 were itself re-enacted?

Defendants (p. 15) state:

> By its terms, the statute at issue [in ***Hecker***] became operative "whenever" the constitution would permit. In that respect, it is identical to Measure 47.

If Measure 47 must become operative <u>whenever</u> the constitution would permit,

there must be a mechanism for this Court to evaluate whether its substantive provisions are constitutional. But Defendants deny that mechanism exists.

B. THE OREGON CONSTITUTION ON THE EFFECTIVE DATE OF MEASURE 47 DID ALLOW SOME ON POLITICAL CAMPAIGN CONTRIBUTIONS OR EXPENDITURES.

In the alternative, Plaintiffs offered a literal interpretation of the words of § (9)(f). Defendants (pp. 36-40) do not answer that literal interpretation but fall back upon their incorrect claims about the intent of § (9)(f).[6]

Defendants (pp. 37-38) attempt to restrict the term "limitations" to "mandatory caps on monetary contributions and expenditures" but fail to cite anything in Measure 47 in support. The Hazell OBR (pp. 28-30) shows that existing law contains many limitations, some numeric and some not, against which no cognizable claim of invalidity can be raised. It further shows (pp. 31-35) that the term "limitations" is not restricted to numeric limits. Defendants (pp. 37-38) try only to exclude disclosure requirements from the term "limitations" but fail to address our references to § (9)(d) (which uses the term "limits" to refer to restrictions other than "mandatory caps on monetary contributions and expenditures") and many dictionaries. And it does not matter if "limitations" do not include disclosure requirements, as we have shown several non-disclosure "limitations on political campaign contributions or expenditures" that are beyond constitutional question (Hazell OBR, p. 29 (4 &

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6. Defendants (p. 37, n10) claim this argument is inconsistent with our argument that § (9)(f)’s "such limitations" are those of Measure 47 itself. We explained why there are two different arguments; Hazell OBR, pp. 17-18.

5)), as are prohibitions on bribery, on expenditures to buy votes (ORS 260.665), on contributing in a false name (***Moyer***), and on contributions and expenditures (including independent expenditures) by foreign nationals or foreign corporations (since Measure 47 defines "prohibitions" as "a numeric limit of zero").[7]

The answer to Defendants (p. 38) is Hazell OBR, pp. 34-35.

C. EVEN IF THE § (9)(f) CONDITION HAS BEEN MET, SOME PARTY MUST PROVE THE UNCONSTITUTIONALITY OF SPECIFIC PROVISIONS OF MEASURE 47.

Even if the § (9)(f) condition has been met, the consequence is merely that the limitations in Measure 47 are suspended, pending the outcome of this litigation to determine their validity. It is undeniable that § (9)(f) contemplates that the constitutionality of those limitations shall be addressed in court. That is the only way that the "Oregon Constitution is found to allow * * * "such limitations."

Defendants (pp. 39-42) simply deny that the constitutionality of the substantive provisions of Measure 47 are "ripe for review," an argument that depends upon Defendants' incorrect view of § (9)(f) and thus conflates justiciability with the merits. See page 6, *supra*.

Defendants (p. 42) state:

> The risk of being struck down on direct review is exactly what the voters sought to avoid by including § (9)(f).

What the drafters sought was for Measure 47 to remain in place until an

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7. 2 USC § 441e(a) was upheld in ***Bluman v. Federal Election Com'n***, ___ FSupp2d ___, 2011 WL 3443833 (DDC 2011).

opportunity to have its limitations validated by (1) a future constitutional amendment or (2) a decision of this Court on the constitutionality of those limitations. They did not seek to avoid court review of any of the provisions of Measure 47. Section (9)(f) expressly contemplates such review, which would be necessary in order for those provisions to be "found" constitutional.

Defendants' arguments about avoidance depend entirely upon its proffered interpretation of § (9)(f) and the term "such limitations." Regarding *stare decisis* respect for ***Vannatta I*** (also asserted by Intervenors, pp. 34-37), that has already been overcome in ***Vannatta II***, (which expressly reversed a central holding of ***Vannatta I***), as recognized and applied in ***Moyer***, 348 Or at 231.

Defendants (pp. 46-47) state that "all the voters who went to the polls to decide the fate of Measures 46 and 47 correctly understood" "that CC&E limitations were unconstitutional." There is no proof of that statement. Voters may well have thought that the limitations in Measure 47 would face constitutional challenge and might be invalidated, but that has nothing to do with "how § (9)(f) would function in th event that Measure 46 failed," as Defendants contend. See pages 13-15, *supra*.

Defendants fail to address any of the Hazell OBR from its IV.B.3 through its end (pp. 35-58).

IV. REPLY OF HORTON PETITIONERS.

The Horton Petitioners have joined the arguments and positions of the Hazell Petitioners and continue to do so. In particular, we join the contention that § ((9)(f) requires judicial review of Measure 47 in the instant case. But,

alternatively, we have sought a declaration that § (9)(f) became invalid under Oregon Constitution, Article IV, §§ 1(4)(d) and 1(2), and should be severed pursuant to Measure 47's severability clause, § (11).

Horton Petitioners argue that Oregon Constitution, Article IV, has implied and inherent limits upon the authority of lawmakers to make laws operative upon occurrence of covert or arbitrary future events. They urge a rule that:

> 1. Later voters must intend that their vote makes an inoperative statute operative and must have notice of the new obligations so they can conform their future conduct to the terms of such law.
>
> 2. The statute's operativeness must be triggered by actual anticipated events which are germane to the substance of the suspended law.

Opening Brief on Review of Petitioners Joan Horton and Ken Lewis [hereinafter "Horton OBR"], p. 31.

Defendants disagree that the Oregon Constitution contains a fundamental premise of notice to changes in citizens' obligations under law and informed voter choice. Contrary to Defendants (p. 3), this Court has never upheld the use a deferred-operation provision that "indefinitely" suspended operation of a statute. Oregon courts have upheld provisions suspending the operation of a statute pending the outcome of a duly scheduled election on a Constitutional amendment. Either the people intended safeguards against "gotcha" lawmaking inherent within the Oregon Constitution, or they allowed unfettered legislative power to surprise the citizenry.

A. CASES RELATING TO PASSING "COMPLETE" LAWS AUTHORITY UNDER ARTICLE I, § 21, ARE NOT GERMANE.

Defendants (pp. 8-11) argue a point that we have never disputed: the Legislature may enact contingently operative legislation, Thus, these pages do not "answer" any issue raised by Petitioners.

Defendants (pp. 9-10) rely upon cases considering statutes which create a currently operative statutory scheme but confer some authority or discretion to act under or utilize the terms of the effective statute, illustrated by ***Libby v. Olcott***, 66 Or 124, 134 P 13 (1913) (special election date set by Legislature, should referrals occur) and all the local option cases which upon which ***Hecker*** and ***Fouts v. Hood River***, 46 Or 492 (1905), rely (discussed in Horton OBR, pp. 14-18 and notes 8-12).

Defendants (pp. 11-12) claim that ***Hecker*** presents "exactly the type of contingency provision" as § (9)(f). Horton OBR (pp. 3, 5, 11-13) explains that ***Hecker*** and ***Fouts*** drew most heavily from decisions from other jurisdictions concerned with the propriety of "delegating" choices to local voters under duly-enacted "local option" laws. Accurately analyzed, these are not delegations of the power to "make" law. They simply authorize action under laws that are currently both effective and operative. None of these decisions continues to have much relevance in Oregon, which allows voters co-equal legislative powers under Article IV. Thus, ***Hecker*** and ***Fouts*** do not articulate a analytical underpinning for their expansive statements about the extent of legislative power to chose "any" conceivable contingency.

Plaintiffs have not questioned the vitality of ***Hecker*** on its facts, which are

actually obverse to the present case. Had Measure 46 passed, ***Hecker*** compels the conclusion that Measure 47 did not conflict with the Constitution. Merely because the language under consideration in ***Hecker*** stated a valid contingency (in light of the actual outcome of the expected election), ***Hecker*** does not become a holding of law on the converse. The question now is: does § (9)(f) presently offer "a certain contingency or future event." ***Marr v. Fisher***, 182 Or 383, 389, 187 P2d 966 (1947) (emphasis supplied)]. The Oregon cases have all dealt with fact situations where the voters could be presumed to know the meaning of a the "yes" or "no" vote, because of the proximity of the election on the Constitutional amendment. Resolution here thus does not require overturning any prior decision, because no prior case has actually held that a law could become operative by surprise.

Defendants throughout their brief offer an extraordinary interpolation or "spurious § (9)(f)":

> Measure 47 will "become * * * effective at the time that the Oregon Constitution is * * * amended to allow such limitations [*as were enacted by voters as Measure 9 of 1994 and struck down by* ***Vannatta v. Keisling****, 324 Or 514, 931 P2d 770 (1997)*].

See page 9, *supra*. This requires a complete fiction as to what 2006 voters intended by § (9)(f) or what future voters will know about the 1994 and 2006 measures. In other words, Defendants now argue that Measure 47 will spring into effect when totally different terms are considered by this Court (those of Measure 9 of 1994), proving Plaintiffs' argument about arbitrary or covert activation of Measure 47.

Or the Court may read the terms literally as meaning:

> Measure 47 will "become * * * effective at the time that the Oregon Constitution is * * * amended to allow such limitations [, meaning any "limitations on political campaign contributions or expenditures"].

The literal reading would mean that Measure 47 can immediately become operative by any amendments relating to campaign contributions or expenditures, such as if voters amend the Oregon Constitution to forbid campaign donations by Native American tribes.

Defendants (pp. 13, 14-15) argue that Plaintiffs cannot show any evidence of any limit on the power of the Legislature to make laws contingent upon non-public, obscure, or arbitrary events. But they offer no case law allowing such surprise operation and no evidence that the people of Oregon granted or retained unfettered legislative power to surprise later voters with the operation of dormant statutes.

Plaintiffs offered two forms of evidence for implicit limits on surprise lawmaking. First, Oregon Constitutional Convention delegates (including George Williams) held basic assumptions that citizens would not use legislative power to deny rights to other citizens (Horton OBR, p. 26) and set out procedural guarantees for notice of lawmaking activity. Second, Plaintiffs offered evidence from mid-19th Century jurisprudence that state courts held that contingencies giving operative effect to laws must be non-arbitrary, fair, related to the dormant statute, and sound public policy. In ***State v. Parker***, 1854 WL 3630, *1, 26 Vt 357 (1854) (Horton OBR, p. 17), C.J. Redfield stated it thus:

> If the operation of a law may fairly be made to depend upon a future contingency, then, in my apprehension, it makes no essential difference what is the nature of the contingency, so it be an equal and fair one, a moral and legal one, not opposed to sound policy, and so

> far connected with the object and purpose of the statute as not to be a mere idle and arbitrary one.

The core group of lawyers and judges who shaped the Oregon Territorial laws and served as delegates to the Oregon Constitutional Convention in 1857[8] may be presumed to have had a similar mid-19th Century world view.[9] This statement of inherent limitations upon unfair, arbitrary or irrelevant contingencies is quoted with approval in ***Boardman v. City of Butte***, 4 Mont 174, 1 P 414, 420-21 (1881); ***Atwood v. Hunter***, 38 Kan 578, 17 P 177, 181-2, (1888); ***Minneapolis, St. P.& S Ry. Co. v. Railroad Comm'n***, 136 Wis 146, 116 NW 905, 911 (1908); ***Hudspeth v. Swayze***, 85 NJL 592, 599, 56 Vroom 592, 89 A 780, (1914).

This is the rule and public policy adopted in more recent cases as well. Defendants (p. 14) incorrectly claim no other state has announced the rule we propose.[10] Plaintiffs offered ***Henson v. Georgia Indus. Realty Co.,*** 220 Ga 857, 862, 142 SE2d 219, 224 (1965), which summarized the "general rule":

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

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8. See Horton OBR, pp. 39-40.

9. Prof. Cooley quotes this passage in his TREATISE ON THE CONSTITUTIONAL LIMITATIONS (1868), p. 122 n1.

10. ***In re Opinion of the Justices,*** 227 Ala 291, 149 So 776 (1933), cited by Defendants, p. 16, references cases where the dormant enabling act passed at the same legislative session which referred the enabling Constitutional amendment, which also passed.

This uses "anticipation" in the ordinary meaning of "with advance thought to" or "expectation of" an event. When the constitutional amendment election is not actually "expected" at the time the contingently operative statute is passed, then the later amendment must "specifically authoriz[e] and validat[e]" the non-operational stature. The modern formulation of the rule quoted with approval in ***State ex rel. Woodahl v. Straub***, 164 Mont 141, 146, 520 P2d 766, *cert denied*, 419 US 845, 95 SCt 79, 42 LEd2d 73 (1974)); and ***Smigiel v. Franchot***, 410 Md 302, 317 978 A2d 687 (2009). In each and every case, the statute was passed in clear anticipation of a particular proposed election on a constitutional amendment.

B. SECTION § (9)(f) DOES NOT ALLOW ANY INFORMED "DECISION."

Defendants later (p. 16-17) rely upon scholarly reviews of statutes which truly do delegate some power to an executive officer or some agent for ultimate definition of terms or decisions regarding facts. These cases, now recognized as authorizing limited quasi-legislative or quasi-judicial powers, are not relevant. Those "delegation" issues have been settled since the New Deal.[11] The distinction between (1) delegating the power to "make law" (which Plaintiffs do not raise) and (2) under what circumstances citizens become subject to the law

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11. The Oregon "delegation" of powers cases required construction of Article I, § 21, not here at issue. The Legislature may create administrative bodies and delegate to them the duty of determining the existence of facts upon which the operation of a law may depend, in conformance with Article I, § 21. ***City of Portland v. Welch***, 154 Or 286, 303 (1936); ***M. & M. Woodworking Co. v. State Industrial Accident Commission***, 176 Or 35, 46 (1945); and ***State ex rel. Peterson v. Martin***, 180 Or 459, 473 (1947).

(which Plaintiffs do raise) is simple.

Defendants argue (p. 16) there is no "practical reason" to limit the unfettered use of contingent events, because the practice is "widely used" and § (9)(f) merely delegates to courts to determine "whether a contingency has occurred." Determining "whether" facts have occurred is commonplace, when there is an existing statutory scheme and the delegated agency or officer "fills in the gaps" to determine when the facts which trigger statutory authority have arisen under "'delegative terms,' terms that express incomplete legislative meaning that the agency is authorized to complete." ***Coast Security Mortgage Corp.***, 331 Or 348, 354, 15 P3d 29 (2000). Examples are shown in the law review commentators Defendants cite (p. 16). Lawson, *Delegation and Original Meaning*, 88 VA L REV 327 (2002), discusses the separation of powers doctrine and propriety of legislative delation of some power to an agency, executive or fact-finder. This is not an issue in this case.

We have previously noted that § (9)(f) does not "delegate" anything to a decision-maker. Also, § 9(f) does not purport to offer a "decision" for voters or judicial officers or future litigants in any meaningful sense. Neither future voters or judicial officers deciding some issues would be <u>determining</u> <u>whether</u> a contingency has occurred, but instead by their unwitting conduct those voters or judges will <u>inadvertently cause</u> the contingency to occur. Measure 47 will spring into action without the conscious intent of anyone. This is not a decision; it is an accident.

Section (9)(f) does not pose any factual determination be applied under an

operative statute triggering some currently available powers, as discussed in Lawson, pp. 361-372, 381-89).[12] Here, § (9)(f) is beyond "unfettered" discretion, since discretion involves an element of conscious choice. Instead, § (9)(f) leaves the operation of Measure 47 to uninformed, accidental decisions of voters or litigants.

Defendants (p. 17) next misstate Plaintiffs' reference to ***Northern Wasco County People's Utility Dist. v. Wasco County***, 210 Or 1, 305 P2d 766 (1957). Plaintiffs are aware of the factual distinctions Defendants recite, but Plaintiffs have argued (Horton OBR, pp. 29-30) that these are distinction without a principled public policy difference.

Defendants (pp. 19-20) posit that voters will know when an amendment allowing CC&E limits will pass. Of course, future voters will be aware of the text of an amendment before them, but can they know that passing it will cause a 2006 statute to become operative?

Defendants (p. 20) offer another contradiction, where they claim that both the contingencies in § (9)(f) "are directly and obviously related to the substance

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12. In fact, in discussing the closest analogy to the present facts, Prof. Lawson later concludes that, regardless of proper delegations of authority to determine that facts exist to authorize actions under existing laws, "Congress cannot leave the effective date of a statute to the unfettered discretion of the President or anyone else." *Id.*, 390.

    Huefner, *The Supreme Court's Avoidance of the Nondelegation Doctrine in Clinton v. City of New York: More Than "A Dime's Worth of Difference,"* 49 CATH U L REV 337, 342-46 (2000), cited by Defendants, is a study of the separation of powers doctrine, not relevant here.

of the provisions of Measure 47." But the State repeatedly denies exactly that at least a dozen times, claiming instead that the "limitations" referred to by both of the contingencies are not those of Measure 47 at all but instead are those of the "category" of Measure 9 of 1994 "limitations that this court struck down in [***Vannatta I***]." Defendants, p. 3. They claim (p. 6) that Measure 47 is dormant until "this court abrogates its holding in [***Vannatta I***]." ***Vannatta I*** had many holdings, some pertaining to Article I, § 8, and others pertaining to Article I, § 26, Article II, § 8, and Article II, Section 22. Which "holding" must be abrogated?

This is confounding. Defendants claim that any constitutional amendment which activates Measure 47 must be one to allow the limitations struck down in ***Vannatta I***, not the limitations of Measure 47. Yet Defendants (p. 20) claims that this result is not arbitrary, because the contingencies in § (9)(f) "are directly and obviously related to the substance of the provisions of Measure 47." These positions are clearly contradictory. And what is obvious in asking voters to adopt something from Measure 9 of 1994 which will, without any reference to Measure 47, activate Measure 47?

Defendants (pp. 22-23) further contradict their position asserted throughout this litigation by claiming for the first time that, if § (9)(f) is unconstitutional, then only some of § (9)(f) should be severed. See Respondents/Cross Respondents' Brief [in the Court of Appeals], p. 5 (and similar at p. 49):

> [I]f this court were to conclude that section (9)(f) of Measure 47 is * * * unconstitutional, the appropriate remedy would be to sever that section as provided for by both the measure's own severance provision and by ORS 17.040, and to allow the remainder of the measure to

take effect.

Defendants' new position defies the plain meaning of the text of § (11) of Measure 47 by claiming that, for complete severance of § (9)(f), "plaintiffs must demonstrate that *both* contingencies identified in § (9)(f) that would trigger operation of the law * * * are invalid." Defendants offer no support for this new position. Instead, they for the first time claim that the 5 words "is found to allow, or" should be stricken. The genesis of this argument is explained (Hazell OBR, p. 13), and (1) no party has previously advocated striking those 5 words (or any other words), (2) no party defended the trial court's *sua sponte* striking of those 5 words, and (3) the Court of Appeals opinion evaluates and applies the 5 words, as if not stricken.

Selectively removing only the 5 words would be unlawful for reasons set forth in the Plaintiffs' briefs to the Court of Appeals and never answered by another party. See Hazell OBR, pp. 12-14. Defendants cite ***City of Portland v. Dollarhide***, 300 Or 490, 503-04, 714 P2d 220 (1986), but that does not consider selective severance when doing so is expressly contrary to the statute's own severability clause (which requires severance by "section, subsection, and subdivision," not by groups of words)[13] and is contrary to ORS 174.040.[14]

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13. ***Clear Channel Outdoor, Inc. v. City of Portland***, 342 OrApp 133, 148, 262 P3d 782 (2011), implemented a statute calling for severance at the level of "Section, Subdivision, sentence, clause or phrase."

14. Defendants (p. 23) offer an incomprehensible footnote, claiming that "§ 11 is, like the rest of Measure 47, presently inoperable." So, according to Defendants, § (9)(f) suspends § (11), even if § (9)(f) is determined to be unconstitutional.

V. REPLY TO INTERVENORS.

Intervenors (p. 1) claim that "Measure 47 will necessitate changes to many section of the Oregon Revised Statutes that have been amended many times by the legislature since 2006." Measure 47 is codified in its own ORS Chapter 259. Intervenors identify no subsequent amended statutes.

For the first time (and without raising it in response to the Petitions for Review), Intervenors (pp. 3, 7, 28-29) claim that there is no "pleading basis for such a challenge" to ***Vannatta I***. To the contrary, Plaintiffs have from the start sought declaratory judgment that the substantive provisions of Measure 47 are valid and in effect. Complaint ¶¶ 10, 16-19, 26-27, 30 [OJIN 1]. See discussion of justiciability at pages 2-7, *supra*.

Intervenors (pp. 3, 29) incorrectly assert the lack of "a record or discussion in the Court of Appeals." Plaintiffs raised at trial and on appeal every issue presented to this Court, including the constitutionality of every limitation in Measure 47 and "procedural protections" of Article IV. The lower court opinions did not discuss most of those issues. Intervenors never responded to Plaintiffs arguments about Article IV, relying instead on its own Article I, § 21 arguments. They cannot complain of the absence of "a record," merely because they did not make one. They posit that Plaintiffs' arguments may be defeated by ignoring them.

This Court can always remand this case for additional analysis, but the present posture presents questions of law that this Court can decide, simplifying issues that might remain for remand. Intervenors (p. 30) claim that there needs

to be some factual record they chose not to make at the summary judgment stage, but do not identify such facts now (nor did they identify the facts in any manner now required by ORAP 5.40(8)(c)[15]). If summary judgment were improper because there would be facts in dispute, that should have been raised 5 years ago.

Intervenors (p. 32) claim that Plaintiff seeks "blessing of Measure 47, based upon a hypothetical set of circumstances," without identifying anything hypothetical about the current case. They claim that "none of the parties have even alleged that any of the substantive sections of Measure 47 are unconstitutional," but Plaintiffs have alleged, from the outset, that those sections are valid and enforceable. There is nothing hypothetical this action to compel implementation and enforcement of those provisions.

Intervenors (p. 4) argue "that no party has challenged the constitutionality of any individual component of Measure 47 other than section 9(f)." But Plaintiffs raised from the outset its claims that Measure 47's substantive provisions are valid, and the lower courts have necessarily addressed that validity in interpreting § (9)(f).

Intervenors (pp. 8-9, 24-25) falsely claim that "The proponents of Measure 47 * * * told voters that Measures 46 and 47 must both be passed." The quotation is not from the Chief Petitioners of either measure but from an *ad hoc* group of persons in Jackson County unknown to the Chief Petitioners. Further,

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15. The current ORAP 5.40 recently clarified existing standards that factual review is disfavored. At all times, making new factual findings on review has required a party to demonstrate "exceptional circumstances."

the statement was not part of the Voters' Pamphlet for Measure 47 and obviously was not meant to address the meaning of § (9)(f). Intervenors (pp. 24-25) then claim that the meaning of Measure 47 should be determined by the measure arguments of its opponents. A less reliable source can hardly be imagined. See pages 13-14, *supra*.

Intervenors (pp. 36-47) take the unique approach of simply denying the existence of matters briefed at length by Plaintiffs below. They (p. 36) claim, for example, that "petitioners have failed to present any new information on the meaning of Article I, section 8" and "failed to identify error in this Court's application of its usual paradigm for analyzing Article I, section 8." This simply denies the existence of 145 pages of briefing, at the appellate level alone, on the subject of Article I, § 8, and ***Vannatta I***, including the Hazell OBR (pp. 39-57), the Hazell Petition for Review (pp. 18-23), the Hazell Opening Brief (pp. 28-49), the Supplemental Memorandum of Primary Authorities to Opening Brief of Hazell Plaintiffs (pp. 1-2), the Horton OBR (pp. 31-54), the Horton Opening Brief (pp. 18-49), the Horton Reply Brief (pp. 7-14), the Horton Plaintiffs' Response to Supplemental Memorandum of Authorities (pp. 1-2), the Brief of Amicus the Better Government Project (pp. 2-22), and Trojan/FEO Amicus Brief, pp. 2-10).

Intervenors (p. 36) claim ***Vannatta I*** should not be reconsidered, because it has been cited often. Westlaw currently lists 5 cases in its "history" of ***Vannatta I***, all of them listed as "negative citing references." Reply App-1. Intervenors (pp. 36-37) then falsely claim that "voters were told that [Measure

47] would be effective only if the Constitution were amended or unless ***Vannatta I*** was overturned." Intervenors cite nothing to support their claim about voters being told that ***Vannatta I*** had to be overturned.

Regarding Article II, § 8, Intervenors (pp. 39-40) claim that we must show that there existed a "pre-1859 Oregon territorial statute that limited campaign contributions or expenditures." First, the Article II, § 8, analysis has nothing to do with limiting campaign contributions or expenditures. It pertains to the meaning of the word "election" at the time of the adoption of the Oregon Constitution. We show that "election" by then had come to encompass activities occurring before the day of the election, including campaigning by the candidates and their supporters and detractors. Horton Opening Brief, pp. 18-39. If "election" includes the campaigning phase, then Article II, § 8, authorizes restrictions on campaigning to prevent "all undue influence therein, from power, bribery, tumult, and other improper conduct," regardless of Article I, § 8, as was recognized in ***Vannatta I*** itself, 324 Or at 528-36.

We also show that limitations on campaign contributions and expenditures were enacted, before 1859, in states having identical or near-identical matches for Article I, § 8, and Article II, § 8, such as Texas. Horton OBR, pp. 34-47).

Intervenors (p. 41) then claim that the 1787 US Constitution uses "election" in the mechanics of voting sense. But that was 70 years before adoption of the Oregon Constitution. Undoubtedly, "election" in 1857 (and today) was and is used both to refer to balloting procedures, in context, the lengthy process of campaigning to persuade voters. We show where "election" was used in the

latter manner. The fact it was sometimes used in the former manner (Intervenors, p. 42) is immaterial. Obviously, statutes which set the "time and place" for elections refer to mechanics of the day of the election. But Texas, for example, in 1856 used its "elections" authority under the Texas Constitution, Article 16, § 2 (language included in Oregon's Constitution), to adopt a law banning furnishing "money to another, to be used for the purpose of promoting the success or defeat of any candidate." Horton OBR, pp. 45-46.

Intervenors (pp. 44-47) believe that Measure 47's findings are relevant only to the "compatibility exception." Measure 47's legislative findings do contradict ***Vannatta I***'s generalizations about "[t]he political history of the nation" and are entitled to near complete judicial deference. Hazell OBR, p. 28; Trojan/FEO Amicus Brief, pp. 3-6. Those legislative findings also contradict ***Vannatta I***'s conclusion that Measure 9 of 1994 was a ***State v. Robertson***, 293 Or 402, 649 P2d 569 (1982), "category 1" statute. 324 Or at 539. The harm of large campaign contributions is set forth in detail in Measure 47 itself, § (1). See Hazell Opening Brief, pp. 45-46.

Intervenors (p. 46) claim that cases do "not preclude judicial inquiry into the actual facts." But Defendants and Intervenors here have never disputed the facts set forth in the legislative findings and claimed no material facts were disputed.

> [P]ublic policy can, under our constitutional system, be fixed only by the people acting through their elected representatives. The District Court's responsibility for making findings of fact certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion or even to reject the legislative judgment * * *.

Firemen v. Chicago, RI I PR Co., 393 US 128, 138-9, quoted with approval in ***American Cam Co. v. OLCC***, 15 OrApp 618, 631 (1974) (upholding "bottle bill").

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Respectfully Submitted,

/s/ Linda K. Williams

LINDA K. WILLIAMS
OSB No. 78425
10266 S.W. Lancaster Road
Portland, OR 97219
503-293-0399 voice
866-795-9415 fax
linda@lindawilliams.net

Attorney for Petitioners on Review Joan Horton and Ken Lewis

/s/ Daniel W. Meek

DANIEL W. MEEK
OSB No. 79124
10949 S.W. 4th Avenue
Portland, OR 97219
503-293-9021 voice
866-926-9646 fax
dan@meek.net

Attorney for Petitioners on Review Bryn Hazell, Francis Nelson, Tom Civiletti, David Delk, and Gary Duell

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

Length of Opening Brief

I certify that the foregoing Reply Brief complies with the word-count limitation allowed by the Court for this brief (8,000 words). The motion was dated October 21, 2011, and sought a consolidated reply brief of 8,000 words. The word count of this Opening Brief as described in ORAP 5.05(2)(a) is 7991 words.

Type Size

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

Dated: December 7, 2011

/s/ Daniel W. Meek

Daniel W. Meek

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I FILED the original REPLY BRIEF ON REVIEW OF ALL PETITIONERS ON REVIEW (HAZELL PETITIONERS AND HORTON PETITIONERS) by Efile this date and further that I SERVED it by Efile on the parties listed in No. S059245 (control). I SERVED it also by emailing a true copy to each counsel below.

JOHN KROGER
Attorney General
Solicitor General
MARY WILLIAMS
Solicitor General
CECILE RENICHE-SMITH
cecil.a.renichesmith@doj.state.or.us
MICHAEL CASPER
michael.casper@doj.state.or.us
1162 Court St., Suite 400
Salem, OR 97301-4096

for Defendants-Respondents Cross-Respondents/Respondents on Review: Kate Brown and John Kroger

P.K. RUNKLES-PEARSON
OSB No. 061911
Stoel Rives LLP
900 S.W. 5th Avenue, Suite 2600
Portland, OR 97204
(503) 224-3380
pkrp@stoel.com

Attorney for Amicus Curiae, ACLU Foundation of Oregon

JOHN DILORENZO, JR.
johndilorenzo@dwt.com
GREGORY CHAIMOV
gregorychaimov@dwt.com
Davis Wright Tremaine LLP
1300 S.W. 5th Ave Ste 2300
Portland, OR 97201

for Intervenors-Respondents Cross-Appellants/Respondents on Review Fred Vannatta and Center to Protect Free Speech

JAMES NICITA
james.nicita@gmail.com
302 Bluff Street
Oregon City, OR 97045

for Amicus Elizabeth Trojan and Fair Elections Oregon

ERIC C. WINTERS
eric@ericwinters.com
30710 S.W. Magnolia Avenue
Wilsonville, OR 97070

for Amicus Better Government Project

Dated: December 7, 2011

/s/ Daniel W. Meek

Daniel W. Meek