

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

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

December 16, 2011

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OREGON CONSTITUTION

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The Supplemental Answering Brief of Respondents on Review, Kate Brown, Secretary of State, and John R. Kroger, Attorney General [hereinafter "State's Supplemental Answering Brief"] makes arguments contrary to the positions of the Petitioners on Review and other arguments which appear to contradict the positions taken by Defendants in their Brief on the Merits of Respondents on Review, Kate Brown, Secretary of State, and John R. Kroger, Attorney General [hereinafter "State's Brief"].

I. ARGUMENT REGARDING OPERATION OF § (9)(f) OF MEASURE 47.

The State's Supplemental Answering Brief (p. 1) states:

Measure 47's deferred-operation provision, § (9)(f), provides that the act will not "become effective" until laws allowing political campaign contributions or expenditures are constitutionally permissible.

That is not the case. Instead, § (9)(f) provides that the Act "shall become effective at the time that the Oregon Constitution is found to allow, or is amended to allow, such limitations." The term "such limitations" refers to the limitations in Measure 47 itself, not to other or generic "laws allowing political campaign contributions or expenditures." See Opening Brief on Review of Petitioners Bryn Hazell, Francis Nelson, Tom Civiletti, David Delk, and Gary Duell [hereinafter "Hazell OBR"], pp. 16-28; Reply Brief on Review of All Petitioners on Review (Hazell Petitioners and Horton Petitioners) [hereinafter "Reply Brief of All Petitioners"], pp 8-10.

Further, if the term "such limitations" is interpreted to refer to other or generic such laws, then those laws, constitutionally permissible, already exist. See Hazell OBR, pp. 28-35.

The State's Supplemental Answering Brief (p. 3) states (emphasis added):

Section (9)(f) is a direct application of the method approved in *Hecker*: by its own terms, Measure 47 would become law on the date prescribed by the constitution in this case, 30 days after the election pursuant to Article IV, section 1(4)(d), of the Oregon Constitution but would not operate **until such time as the limitations contained within the measure were constitutionally permissible.**

This contradicts State's Brief (pp. 3, 6, 26, 30, 35), where Defendants argue that Measure 47 would not operate until limitations akin to those abrogated in *Vannatta I* are found to be constitutionally permissible. For example (State's Brief, p. 3)

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*].

But here, at State's Supplemental Answering Brief (p. 3), Defendants reverse course and claim that the Measure 47 limitations and not in operation "until such time as the limitations contained within the measure were constitutionally permissible."¹ That is the position of all Petitioners.

1. State's Supplemental Answering Brief (p. 10) makes a similar statement:

The plausible, constitutional, construction of Measure 47 is that, just like the law in *Hecker*, Measure 47 became law, but was then suspended by its own terms until such time as it was constitutionally permissible.

Thus, it appears that Defendants have come full circle. In the trial court, Defendants argued that: "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. Then, at the Court of Appeals and in the State's Brief (p. 3 and elsewhere) to this Court, they argued that the term "limitations on campaign contributions and expenditures" in § (9)(f) "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*]." Now, in their State's Supplemental Answering Brief, they argue both positions, which are contradictory.

II. USE OF VOTER PAMPHLET ARGUMENTS AS LEGISLATIVE HISTORY.

State's Supplemental Answering Brief (p. 7) states:

As the state explained in its opening brief, the voters who adopted Measure 47 knew that CC&E limits were constitutionally impermissible.

That is not explained or proven in the State's Brief. What voters knew was that some portions of Measure 9 of 1994 had been ruled constitutionally impermissible, not that "CC&E limits," generically and without reference to a specific statute, were constitutionally impermissible.

State's Supplemental Answering Brief (p. 7) states:

In other words, the voters intended to put in place a deferred-operation provision of the kind upheld in *Hecker*, in order to shield the law from a constitutional challenge.

There is no proof of voters' intent regarding the deferred-operation provision, §

(9)(f). See Reply Brief of All Petitioners, p. 14. Further, there is no proof that voters intended "to shield the law from a constitutional challenge," since § (9)(f) itself envisions that the limitations of Measure 47 "shall become effective at the time that the Oregon Constitution is found to allow * * * such limitations." Such a finding contemplates and requires judicial review of the provisions of Measure 47 and does not prohibit it.

State's Supplemental Answering Brief (p. 8) cites *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551, 559, 871 P2d 106 (1994), for the proposition that the legislative history of a measure "includes the ballot title, arguments for and against the measure included in the voters' pamphlet, and contemporaneous news reports and editorial comment on the measure." But Oregon courts do not rely upon voters' pamphlet arguments, which 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). See Combined Reply and Cross-Answering Brief of Horton Plaintiffs (April 13, 2009), pp. 38-42. Further, the voters' pamphlet arguments Defendants cite are not those "for and against the measure" but are for or against a different measure. See Reply Brief on Review of All Petitioners, pp. 10-14.

State's Supplemental Answering Brief (p. 9) states that the voters' pamphlet

statements and arguments about Measure 47 and Measure 46 "do not offer any information about or explanation of how § (9)(f) would operate, and it is § (9)(f)'s construction that is at issue here. Accordingly, the legislative history does not offer the answer that intervenors suggest." This statement contradicts the position of Defendants, as expressed at State's Brief (pp. 3, 6, 24, 25, 29, 30, 32, 37) that legislative history in the form of voters' pamphlet arguments does demonstrate the meaning and proper construction of § (9)(f). We agree with the new position of Defendants that the legislative history does "not offer information about or explanation of how § (9)(f) would operate," as we have previously stated. See Reply Brief on Review of All Petitioners, pp. 10-15 (p. 14 in particular).

Dated: December 16, 2011

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 Opening Brief

I certify that the foregoing SUPPLEMENTAL REPLY BRIEF OF ALL PETITIONERS ON REVIEW (HAZELL PETITIONERS AND HORTON PETITIONERS) contains, as described in ORAP 5.05(2)(a), 993 words.

Type Size

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

Dated: December 16, 2011

/s/ Daniel W. Meek

Daniel W. Meek

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I FILED the original SUPPLEMENTAL REPLY BRIEF 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.

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